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MASSACHUSETTS REPORTS

235

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

FEBRUARY 1920 — MAY 1920

ETHELBERT V. GRABILL

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

1921

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JUSTICES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.

HON. HENRY KING BRALEY.

HON. CHARLES AMBROSE DE COURCY.

HON. JOHN CRAWFORD CROSBY.

HON. EDWARD PETER PIERCE.

HON. JAMES BERNARD CARROLL.

HON. CHARLES FRANCIS JENNEY.

ATTORNEY GENERAL

HON. JOHN WESTON ALLEN.

IN pursuance of the system adopted in 1874, beginning with 115 Mass., the cases are reported in the order of decision, and those decided on the same day are arranged according to the dates of argument or submission on briefs. The only exception to this rule is that, where an opinion is withdrawn temporarily by order of the court and is returned to the reporter too late to be printed in its regular place, it is inserted at the time of its return.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

FREDERICK S. HALL *vs.* COMMONWEALTH.

Bristol. October 27, 1919. — February 3, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Damages, For property taken or damaged under statutory authority. *Practice*,
Civil, Exceptions, Conduct of trial: judge's charge.

At the hearing of a petition for the assessment of damages resulting from the taking of a portion of a farm of the petitioner for the construction of a State highway, it appeared that the land taken had abutted on a dirt road or highway and that the newly constructed State highway was a "cement road," which, by being more direct, made the distance to a nearby village a thousand feet less. The petitioner asked for a ruling that there was no evidence of any benefit which could be set off in damages against the petitioner. The ruling was refused. *Held*, that the frontage on a better and more desirable road and the more convenient access to the village were elements of benefit which were direct and special and could be set off in damages against the petitioner, even if all the real estate in the vicinity which abutted on the new highway was benefited similarly.

If from a bill of exceptions it appears that a judge in his charge did not give in terms a ruling requested by the excepting party, which was a correct statement of the law and was applicable to the circumstances of the case on trial, and that the party asking for the ruling neither excepted to the failure to give the ruling in terms nor called the judge's attention to contentions of his that the principle of law stated in the ruling was not made sufficiently clear by the charge and that the ruling should have been given, the record shows no ground for this court to consider such contentions.

The use, by a judge in his charge at the trial of a petition for damages resulting from a taking of land for the construction of a State highway, of the word "all," modifying the word "estates" in some passages in a long charge defining what were benefits resulting to estates generally in the neighborhood from the construction of the highway, when the charge was read as a whole was *held* to have been sufficiently accurate.

At the trial of the petition above described, the judge submitted five special questions to the jury in an endeavor to determine the damage to the petitioner, the special benefit which resulted to him from the construction of the highway and the benefit which resulted to him in common with others generally in the neighborhood. One of such questions was as follows: "Did the building and maintenance of the road confer upon the estates in the neighborhood generally a benefit or benefits of a sort common to them all?" *Held*, that the question was appropriately expressed and that the use of the word "all" was not erroneous.

PETITION, filed in the Superior Court on September 1, 1917, for the assessment of damages resulting from a taking of land for the construction of a State highway from the town of Norton to the city of Taunton under the authority of St. 1915, c. 230.

This petition and a petition by one Scott and two other petitions brought by owners of other land taken for the same purpose were tried together before *Hammond, J.* Material evidence is described in the opinion. The jury took a view.

At the close of the evidence, the petitioner asked for the following rulings:

"1. On all the evidence, there is no evidence of any benefit which can be set off in damages against this petitioner.

"2. In setting off benefits in the assessment of damages to land-owners whose property is taken or injured by laying out of a highway, only such benefits are included as are special and peculiar to such property, as distinguished from those which are received from estates generally in the vicinity."

The first ruling asked for was refused. The judge submitted to the jury special questions, which, with the answers thereto, were as follows:

"1. What was the fair market value of the entire Frederick S. Hall property immediately before May 23, 1916, the date when the highway commission made the taking?" Answer: "\$250."

"2. What was the fair market value of the entire Frederick S. Hall property immediately after the taking considering such property in the light of the condition in which it was actually left after the road was completed?" Answer: "\$300."

"3. Did the building and maintenance of the road confer upon the estates in the neighborhood generally a benefit or benefits of a sort common to them all?" Answer: "Yes."

"4. How much, if any, did such kind of benefit or benefits add to the value of the Frederick S. Hall property?" Answer: "\$50."

"5. What, if any, are the petitioner's damages? [Note: Subtract the answer to question (4) from the answer to question (2), and then subtract the sum so obtained from the answer to question (1). The sum then remaining, if any, answers this question (5).]" Answer: "None."

Material portions of the charge of the judge to the jury were as follows:

"I will deal with the case of Mr. Scott, and it may be a typical case, for the same question will apply to all; and we will deal with these special features of the other cases later. . . . I have told you that a man is entitled when his land is taken to such damages, if any, as will make him just as rich as and no richer than he was before, and I have said to you that that statement is subject to some qualifications. It is, and I will try to explain it to you, although it is a very difficult thing to explain not only to juries but sometimes to lawyers. Suppose a man should live just off this main road, one hundred feet on a side road, and suppose none of his land was taken at all, and suppose that the only means of travel that he had to get to Norton before the highway commission came along was an old dirt road, — I am not trying to describe what was there before but I am just making a supposition — an old dirt road, it was full of mud holes, very inconvenient, and very circuitous, taking a long time to get there. And then suppose that the public authorities should come along and take that road over and build a fine wide boulevard — I am not trying to describe the boulevard that is there but I am making that same assumption — and suppose they make it very straight so instead of having to go around a long hill three or four miles he goes right straight to the town where he can carry his products and do his marketing, and it is a great convenience to him to have a fine road to travel over in that way. It is such a great convenience that it actually affects and enhances the value of his land, and it is such a great convenience that everybody else in that vicinity who has occasion to travel, and most people do, derive the same advantage from it, so

that it is a kind of benefit, — that is, the benefit of having a fine road to travel on, a straight road to travel on, and a short road to travel on is a great benefit, and affects the actual values of all property in that vicinity, and yet nobody, or only a few have had any land taken from them. There you will see that everybody in the community in such a case as that gets something added to the value of his land, and he is entitled to it. Sometimes under what is called the betterment acts those benefits may be assessed upon the landowner, and he may have to pay for them, but in this case which is not under any betterment act the people in the vicinity of this property that I am assuming, I am not talking about this present property, the people in the vicinity of this imaginary property would get a benefit, and a money benefit that would go to enhance the value of their property, and they would be entitled to it, and it cannot be taken away from them under this act. So that if you should apply this rule that I have given to you, the difference between the fair market value before and the fair market value after, the fellow who had his property taken would be just as rich and no richer than he was before, but his neighbors who hadn't had their property taken might be a little richer because of that benefit which he too may have shared in. So you see that it isn't quite fair to say that the only damages to which a man in conditions like that is entitled is the difference between the fair market value before and the fair market value after. . . . You have got to decide the question whether the building of this road, the building and maintenance of this particular road conferred upon all the estates in the neighborhood generally a benefit or benefits of a character which was common to all.

“The inquiry that you have to make is, what kind of benefits were conferred by the building of that road upon the estates generally in that neighborhood, and did such benefits enhance the value of those estates, including this one? Let me give you an illustration of what I mean. I will use the same illustration as I used before. Suppose a State highway is laid out, and it is a better road, the jury thinks it is a better road, a shorter road than the other, an easier road to travel, a more advantageous road, and suppose the jury thinks that the benefits derived from having such a road to travel on, to go to Norton or elsewhere on is a benefit which Mr. Scott in common with all the other proprietors

of estates in the neighborhood share, and suppose they think that element, that that advantage, that that benefit enhanced property, the property in the vicinity, in the neighborhood generally, including Mr. Scott. Then suppose they think it enhanced it a certain amount of money for Mr. Scott. Then if the jury give to him such a sum, or allow to him in the assessment of damages such a sum as would represent that enhancement, he is as well off as anybody else because he gets credit for it. That is to say, he gets credit for such enhanced value of the property as it is completed, as it is left when the road is completed, as the jury may find grows out of the benefit which is shared in common by all of the estates in the neighborhood. That is to say, a right to use a road as a public road; everybody can use a road. If the people in that vicinity by reason of that right, increased public convenience, get a benefit to their estates from that element, then you are to determine how much, if any, such an element or benefit as that, such an advantage, enhancement, added to the value of Mr. Scott's place after the taking. So that your third question is, did the building and maintenance of the road confer upon all the estates in the neighborhood generally a benefit or benefits of a sort common to them all?

"Fourth question, how much, if any, did such kind of benefit or benefits add to the value of the Scott property?

"Now the kind of benefits which you are to take into consideration in these questions are common or general benefits, shared in in common, if you find such to exist, by all the estates in the neighborhood. They are not the kind of benefits which are special to Mr. Scott alone, or any particular class of people in the neighborhood like the abutters on the road. For example, if you find that Mr. Scott's estate after the taking was enhanced in value: that there was an addition to that value by reason of a special and peculiar benefit which Mr. Scott enjoyed, and others in the neighborhood generally didn't enjoy, then he is not entitled to credit for that, and you are not to take that kind of a benefit into consideration in answering the third and fourth questions.

"Let me put you an illustration of what sort of a benefit such a peculiar and special benefit would be. If because the road ran by Mr. Scott's place and he abutted on it, and the road was a better and broader and more desirable road to front upon, and if because he was left by the highway commission fronting on a better and

a more desirable road, his property was therefore enhanced in value by that reason, that would be a special benefit which was not shared in common by all the other estates in the neighborhood. It might be shared in common by other estates that fronted on that road, and indeed it would be, because if it was an advantage for one to be fronting on a better and more desirable street it would be an advantage to another. The reason why it is an advantage is because a man is fronting on the street, and people who don't front on the street couldn't get that kind of an advantage because admittedly it is the kind of advantage that comes from fronting on a street, and it would be a special and peculiar advantage to Scott even if it was shared in by other people who fronted on the street, and it would be different from a general advantage such as I have spoken of a few minutes ago, because other people, all the people in the vicinity wouldn't have that kind of an advantage. They wouldn't be fronting on the street, and they wouldn't be left fronting on the street.

"Now for an advantage of that sort, special and peculiar advantage, Mr. Scott and the others here would not be entitled to any credit. They get that advantage by the layout of the highway and the position of their estates upon the street, and that advantage they are not entitled to credit on. The only advantages they are entitled to take and retain and keep are benefits and advantages of the kind, of the character such as I have described, that is, additional, more convenient use of the road which all people or estates in that vicinity share.

"Now your last question is, what, if any, are the petitioner's damages? I mean by that to sum up the amount, if any, which the petitioner is entitled to recover, and I have appended this so you may know what that means, how to arrive at it. Having answered these previous questions you arrive at five merely by a mathematical calculation of the petitioner's damages. You may have to study this a little but I have given you the formula for it. Subtract the answer to 'four,' that is, what is the amount of the added value, if any, due to general benefits, subtract that answer from the answer to 'two,' which is, what was the fair market value of the property after the taking, and when you have subtracted that take the sum so obtained, and subtract that from the answer to one, which is, what is the fair market value, what was the fair

market value immediately before the taking, and the sum then remaining, if any, answers that question.

"I will give you an illustration of it, and use figures which nobody would claim had any relation to the particular facts of this case. Suppose, for example, you should find that the Scott property was worth \$50,000 immediately before the taking, and suppose that you should find that immediately after the taking it was worth \$55,000, that is, \$5,000 more, and suppose that you should find that there was a benefit or an advantage to all the estates in the neighborhood, shared by all of them, due to this road, which increased, or affected, or added to the value of Mr. Scott's property after the taking to the extent of \$2,000. You would subtract the \$2,000, the value of that enhancement, from the \$5,500, [\$55,000] the value of the property after the taking, and that would leave you \$5,300, [\$53,000] and then you would subtract the \$5,300 [\$53,000] from the \$50,000. Now obviously you can't do that. You can't subtract a larger sum from a smaller, and the result would therefore be that the petitioner would not be entitled to any damages at all.

"Now as I understand the theory of the respondent, that figure, that sum that I have done illustrates the contention that they make in this case, and that is for you to decide. The contention of the Commonwealth is that the property was worth more after the taking than it was before, and that it was worth so much more that even if you credit to the owner this item that corresponds to the \$2,000 which I mentioned, that is the enhanced value due to the general benefit, it still would result in this, that the value of the property after the taking, even with that deduction, was worth more than the value of the property before, and if you should be of that opinion you should bring in a verdict of no damages for the petitioner. If, however, you should be of the opinion that the value of the property after the taking, reduced by this figure corresponding to the \$2,000, that is the added value due to this general benefit, if you find such was less than the value before then the difference is the petitioner's damages, and that is what is meant by the formula in the note appended to the last question. I think if you study that you will see what I mean. If you find also, it is fair to say, if you find that the value of the property after the taking diminished by this item which I spoke of as \$2,000, that is

the amount of the enhanced value due to the general benefit, if you find that the value diminished in that way is exactly equal to the value as it was before then the petitioner would not be entitled to any damages. He would be just as well off as he was before, and he would have a credit for this benefit which is shared in by everybody."

At the close of the charge, the petitioner excepted "to the word 'all' as it appears in the third question at the end. Also to the use of the word 'all' in the charge in the test of general benefits, as I claim that the test is the benefit to the estates generally in the neighborhood and not to all estates in the neighborhood."

The jury returned the answers to the special questions as above stated and found generally for the respondent. The petitioner alleged exceptions to the use of the word "all," as above stated, in the third question and in the charge, and to the refusal to give the first ruling asked for by him.

The case was submitted on briefs.

S. P. Hall, for the petitioner.

E. S. White & A. R. White, for the Commonwealth.

BRALEY, J. The respondent, acting under St. 1915, c. 230, laid out and partially built a State highway in accordance with a plan duly filed in the registry of deeds, and, a strip of the petitioner's land "about five hundred and fifty . . . feet long and eight or nine feet wide, with a stone wall running the whole length of it" on the westerly side of the highway having been taken, the present petition is brought for damages under the provisions of R. L. c. 48. The parcel formed part of a vacant tract used for farming purposes which abutted on a dirt road or highway, and the record states that not only was the new highway a "cement road," but the highway "left the old road" at a point half way between the petitioner's land and "Norton Center . . . saving about one thousand feet for any one who travelled, from the vicinity of the land taken to Norton Center."

The petitioner asked the judge to rule, "On all the evidence, there is no evidence of any benefit which can be set off in damages against this petitioner." The request could not have been given. The jury could find on the evidence, which included a view, that the new highway afforded more convenient access to, and conferred a frontage on a much better and more desirable road. R. L.

c. 48, § 15. It is settled that benefits of this character are direct and special even if all the estates in the vicinity abutting on the street are similarly benefited. *Whitney v. Boston*, 98 Mass. 312, 314-316. *Allen v. Charlestown*, 109 Mass. 243, 246. *Hilbourne v. County of Suffolk*, 120 Mass. 393, 395. *Peabody v. Boston Elevated Railway*, 191 Mass. 513. The benefit which cannot be set off is confined to "that which comes from sharing in the common advantage and convenience of increased public facilities, and the general advance in value of real estate in the vicinity by reason thereof." Wells, J., in *Allen v. Charlestown*, just cited. The petitioner also asked for a ruling, that "In setting off benefits in the assessment of damages to landowners whose property is taken or injured by laying out a highway, only such benefits are included as are special and peculiar to such property, as distinguished from those which are received from estates generally in the vicinity," which is taken substantially from *Peabody v. Boston Elevated Railway*, *ubi supra*. But no exception was taken to the omission to grant this request. If, as now pressed in argument, counsel were of opinion that although he used the definition requested, yet the judge had failed to make sufficiently clear the difference between general and special benefits, he should have called attention to the matter, and excepted to the instructions if he deemed them not in accordance with the request. *Connors Brothers Co. v. Sullivan*, 220 Mass. 600.

The exceptions saved at the close of the charge in so far as applicable to the present case recite, "I except to the word 'all' as it appears in the third question at the end. Also to the use of the word 'all' in the charge in the test of general benefits, as I claim that the test is the benefit to the estates generally in the neighborhood and not to all estates in the neighborhood." While the judge in his endeavor to make clear a distinction which can be legally formulated with precision although not always easy of application by a jury in the particular case, may have discussed and illustrated the questions of general and special benefits at some length, the use of the word "all," when the charge is read as delivered, was sufficiently accurate. *Hilbourne v. County of Suffolk*, 120 Mass. 393, 394. *Parks v. County of Hampden*, 120 Mass. 395, 396.

The remaining exception is confined to the phraseology of the

third question, which with the answer reads as follows: "Did the building and maintenance of the road confer upon the estates in the neighborhood generally a benefit or benefits of a sort common to them all?" The jury answer: "Yes." The question is appropriately expressed. The use of the word "all" at the end merely emphasizes the inquiry which in effect was whether the benefit was a benefit common to all the neighborhood. *Fifty Associates v. Boston*, 201 Mass. 585, 591, 592.

It is urged that the petitioner on the entire record is entitled to recover and that there was a mistrial, but, without intimating any opinion, we cannot consider questions apparently not raised at the trial, and the exceptions must be overruled.

So ordered.

FLORIDA COTTON OIL COMPANY *vs.* CLYDE STEAMSHIP
COMPANY.

SAME *vs.* MAINE COAST COMPANY.

Suffolk. November 12, 1919. — February 3, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Carrier, Of goods. Negligence, Of carrier of goods. Bill of Lading. Contract, Validity. Evidence, Presumptions and burden of proof.

A through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be presumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage. . . ." *Held*, that the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and that the burden of proving such negligence was upon the shipper.

Where goods, shipped by water by a through bill of lading, in the course of the shipment are transferred from one carrier to another, any valid limitation of liability contained in the through bill of lading issued by the first carrier enures to the benefit of the second carrier.

In an action against carriers who, successively, transported the oil from Florida to Maine under the bill of lading above described for damages resulting from the loss of a part of the oil by leakage while in transit, there was evidence tending merely to show that the oil, when delivered to the first carrier, was in new, six hoop, white oak, hand-made barrels, well coopered, made of well seasoned timber and thoroughly tested before being used, and that when the shipment arrived at the port of destination it was short in quantity by reason

of leakage. *Held*, that there was no evidence warranting a finding of negligence on the part of either defendant.

TWO ACTIONS OF CONTRACT OR TORT for the loss of a part of a shipment of cotton seed oil delivered to the defendant in the first action to be transported in barrels under a through bill of lading from Jacksonville in the State of Florida to Machiasport in the State of Maine. Writs dated December 6, 1910, and January 14, 1911.

In the Superior Court the actions were tried together before *Callahan, J.* The material evidence is described in the opinion. At the close of the evidence, the judge ordered verdicts for the defendants; and the plaintiff alleged exceptions.

D. J. O'Connell, for the plaintiff.

D. F. Carpenter, for the Clyde Steamship Company.

G. P. Wardner, for the Maine Coast Company.

BRALEY, J. The plaintiff sues the defendants severally as common carriers in contract or tort to recover for the loss of "four hundred and fifty-eight and 2/15 gallons of cotton seed oil of the value of one hundred seventy-six dollars and thirty-eight cents . . . the same being a part of a shipment of one hundred barrels of oil." A verdict for each defendant having been ordered, the cases are here on the plaintiff's exceptions.

The jury on the evidence would have been warranted in finding the following facts: On September 2, 1908, the plaintiff delivered to the Clyde Steamship Company at Jacksonville, Florida, one hundred barrels of cotton seed oil to be transported under a through bill of lading to Machiasport, Maine, and there delivered to the Machiasport Packing Company, the consignee. The oil was shipped on September 4 and arrived in Boston on September 10, where the barrels were unloaded and transferred to the Maine Coast Company on the day of arrival, which in two shipments, one on September 12, and the other on September 16, forwarded the oil to Machiasport where "it was found that there had been a loss of three thousand four hundred and thirty-six . . . pounds, or four hundred fifty-eight and 2/15 gallons, of the value of thirty-eight and one half cents . . . per gallon, which amounted to one hundred and seventy-six dollars and thirty-eight cents." The oil was received at Jacksonville in barrels which "were new, six hoop, white oak, hand-made barrels, . . . well coopered,

made of well seasoned timber, and were tested" thoroughly before being used.

The defence of the Clyde Steamship Company is, that the uncontradicted evidence shows that when it delivered the shipment to the Maine Coast Company no leakage for which damages are claimed had occurred, and under the eighth clause of the bill of lading, that "No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee" it is not responsible if any loss thereafter occurred. It also contends that under the exemption clauses, that no carrier shall be liable for damages caused by leakage, chafing or loss in weight, it is not liable because the plaintiff failed to offer any evidence from which its negligence can be found.

It was said in *Burroughs v. Norwich & Worcester Railroad*, 100 Mass. 26, 27, "The law is well settled in this Commonwealth, and in most of the United States, that a corporation established for the transportation of goods for hire between certain points, and receiving goods directed to a more distant place, is not responsible, beyond the end of its own line, as a common carrier, but only as a forwarder, unless it makes a positive agreement extending its liability." See also *Saxon Mills v. New York, New Haven, & Hartford Railroad*, 214 Mass. 383; *Hill Manuf. Co. v. Boston & Lowell Railroad*, 104 Mass. 122. While the shipment was an interstate shipment, and under the act of Congress of June 29, 1906, (34 U. S. Sts. at Large, 584, c. 3591, amending the interstate commerce act of 1887, 24 U. S. Sts. at Large, 379, c. 104,) commonly called the Carmack amendment, the initial carrier where the shipment is by rail, or partly by rail and partly by water is made liable for a loss upon the line of a connecting carrier even if the property had been received under a bill of lading restricting the initial carrier's liability to loss upon its own line, *Atlantic Coast Line Railroad v. Riverside Mills*, 219 U. S. 186, *Galveston, Harrisburg & San Antonio Railway v. Wallace*, 223 U. S. 481, *Adams Express Co. v. Croninger*, 226 U. S. 491, the transportation in the present case having been entirely by water, it remains to determine whether the plaintiff at common law was entitled to go to the jury.

The first and second stipulations among other things provided that negligence should not be presumed against the carrier, and

"No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof, or damage thereto, by causes beyond its control . . . or by leakage, breakage, chafing, loss in weight, decay, vermin, changes in weather, heat, frost or wet." "It has long been settled that, while just and reasonable conditions may be imposed limiting his liability as it existed at common law, the carrier cannot be relieved where goods are lost or destroyed during carriage through his own negligence or the negligence of his servants or agents, although in terms the contract of shipment may exonerate him." *P. Garvan, Inc. v. New York Central & Hudson River Railroad*, 210 Mass. 275, 278. And a stipulation exempting the carrier from loss by leakage is reasonable. *Cox v. Central Vermont Railroad*, 170 Mass. 129, 136. The plaintiff introduced no evidence other than leakage as the proximate cause of the loss.

But even if the jury exonerated the Clyde Steamship Company, and found that the Maine Coast Company received the oil at Boston in the condition claimed by the Clyde Steamship Company, the responsibility of the terminal carrier is the same as that of the initial carrier. The Maine Coast Company nevertheless took the oil under the bill of lading issued by the initial carrier, and any valid limitation therein enures to its own benefit. *P. Garvan, Inc. v. New York Central & Hudson River Railroad*, 210 Mass. 275, 278. *Kansas City Southern Railway v. Carl*, 227 U. S. 639. It was open to each defendant therefore to rely upon the exemption, and the loss as we have said having resulted from leakage, the plaintiff to recover had the burden of proving that it was caused by the active negligence of the carrier. *Denny v. New York Central Railroad*, 13 Gray, 481. *Libby v. Gage*, 14 Allen, 261, 263, 265. *School District in Medfield v. Boston, Hartford & Erie Railroad*, 102 Mass. 552. *Clark v. Barnwell*, 12 How. 272, 280. See 6 Cyc. 522, note 35, for a very full collection of cases. A careful examination of the record having failed to show any evidence which would have warranted the jury in so finding as to either defendant, the exceptions in each case must be overruled.

So ordered.

RALPH O. BREWSTER & another vs. HORACE G. WESTON
& others.

Suffolk. December 5, 1919. — February 24, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Insane Person. Attachment. Bona Fide Purchaser. Deed, Validity.

A deed by an insane person is ineffectual to convey a title to land which is good against the grantor or his heirs or devisees unless it later is confirmed by the grantor when of sound mind, or by his legally constituted guardian or, after his death, by his heirs or devisees.

An insane person for a nominal consideration conveyed certain real estate to one who forthwith for a like consideration conveyed it to the insane person and a third person and to the survivor of them. A creditor of the third person brought an action against him to recover his debt, attached his interest in the real estate and recovered a judgment. In a suit by a guardian of the insane person to set aside the deeds and to enjoin the attaching creditor from enforcing his judgment against the land, it was *held*, that the plaintiff was entitled to an injunction against the attaching creditor because, although the attaching creditor was in the position of a purchaser for value, he obtained by his attachment no greater right than the judgment debtor had, and, the insane person's deed being voidable as to the judgment debtor, was voidable as to the attaching creditor and should be declared void.

BILL IN EQUITY, filed in the Superior Court on December 2, 1918, and afterwards amended, by the guardians of Helen Bridge Andrews against Horace Greeley Weston, Mildred White and Sydney B. Larrabee, seeking a recovery of certain personal property of the plaintiffs' ward alleged to be wrongfully in the possession and control of the defendant Weston and to have declared void deeds of certain real estate by the plaintiffs' ward to the defendant Larrabee and by him to the ward and the defendant Weston and their survivors, the defendant White having attached the interest of the defendant Weston in an action against him in which she had recovered judgment.

By leave of court, the ward, by the plaintiffs as her next friends, was allowed to intervene as a party defendant.

In the Superior Court, issue being joined as to all the defendants, the suit was heard by *Jenney, J.* Material facts found by him are described in the opinion. By his order a final decree was entered,

directing the defendant Weston to pay to the plaintiffs \$1,895.42 with interest and costs; dismissing the bill without costs as to the defendant Larrabee, declaring the conveyance of the real estate by the plaintiffs' ward through Larrabee to the ward and Weston and the survivor of them to be null and void; enjoining Weston from asserting any claim thereto and directing him to execute such deed or other conveyance, if any, as might be necessary or appropriate to restore to the plaintiffs' ward the full record title to the property in question; and enjoining the defendant White "from further proceeding in pursuance of or under any execution hitherto issued in her favor against the defendant Weston in the sale of said real estate as the property of said Weston, and from interfering in any way with the possession of said Helen B. Andrews, or her guardians as aforesaid, in and to said real estate, or from creating any cloud upon the title of said Helen B. Andrews to said premises."

The defendant White alone appealed.

H. H. Pratt, (J. B. Newhall with him,) for the defendant White.

C. Bosson, (E. M. Dodd, Jr., with him,) for the plaintiffs.

CROSBY, J. This is a suit by the guardians of Helen B. Andrews, an insane person, to set aside two deeds of certain real estate owned by the ward, and to recover certain personal property which is not involved in this appeal. The ward has been admitted as an intervening party.

The real estate was conveyed by the insane person to the defendant Larrabee for a nominal consideration, and on the same date for a like consideration was conveyed by him to the insane person and to the defendant Weston and the survivor of them and their heirs and assigns. The defendant White has attached the real estate as the property of the defendant Weston in an action brought by her against him and has recovered a judgment in that action. The trial judge found that the ward was mentally incompetent when she made the conveyance to Larrabee, and that the defendant Weston knew of her mental condition when the deed was executed. No question of ratification by the grantor arises as there is nothing to show that she has ever recovered her reason.

It is well settled in this Commonwealth that the deed of an insane person is ineffectual to convey a title to land, good against

the grantor, or his heirs and devisees, unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees. *Valpey v. Rea*, 130 Mass. 384. *Allis v. Billings*, 6 Met. 415. *Gibson v. Soper*, 6 Gray, 279. *Brigham v. Fayerweather*, 144 Mass. 48. *Brown v. Brown*, 209 Mass. 388, 394.

While some confusion has arisen by reason of the use of the terms "void" and "voidable," it is settled in this Commonwealth that the deed of an insane person is not void, but voidable, and may, after the grantor is restored to his right mind, be adopted and ratified. *Allis v. Billings*, *supra*. *Gibson v. Soper*, *supra*. *Sutcliffe v. Heatley*, 232 Mass. 231.

As a contract made by an insane person is voidable, it is not affected by the circumstance that the other party acted fairly and without knowledge of the want of mental capacity or of circumstances which ought to have put him on inquiry, because he who deals with one who is insane or with an infant does so at his peril. *Seaver v. Phelps*, 11 Pick. 304. *Brigham v. Fayerweather*, *supra*. *Sutcliffe v. Heatley*, *supra*. *Reed v. Mattapan Deposit & Trust Co.* 198 Mass. 306, 314.

The question, whether an innocent purchaser from the grantee of an insane person is entitled to hold under his deed, is one which has not been decided by this court. It is the contention of the defendant White that, as she had no knowledge of the mental incapacity of the ward, she was justified in relying upon the record when she attached the property, and therefore is in the position of an innocent purchaser for value. R. L. c. 127, § 4. R. L. c. 167.

We are of opinion that, while an attaching creditor is in the position of a purchaser for value, *Waltham Co-operative Bank v. Barry*, 231 Mass. 270, yet under the circumstances here disclosed, the defendant White obtained by the attachment no greater rights in the land than the judgment debtor and grantee had, and, the deed being voidable as to him, is equally voidable as to her. On principle there can be no sound distinction between the right of the guardian of an insane person to avoid a deed as against the grantee of the ward, and one to whom the land has been subsequently conveyed. By a parity of reasoning, the right of a subsequent purchaser for value to hold the land would seem

to be no greater than that of the original grantee who took title without knowledge of the grantor's mental incapacity.

The purchaser of an apparently perfect record title is not protected against all adverse claims; it may be bad because the grantor may have been insane, or an infant, or because title has been defeated by adverse possession. A grantee cannot assume that the previous grantors had legal capacity to convey, but must take at the risk of all through whom his title has passed. He must rely upon the covenants of his deed. The absolute and paramount right of infants and insane persons to avoid their contracts may be exercised against an innocent purchaser for value from the grantee, otherwise the law will fail to afford that measure of protection to the mentally helpless and incompetent which their condition justly requires. *Hovey v. Hobson*, 53 Maine, 451. *Rogers v. Blackwell*, 49 Mich. 192. *McKenzie v. Donnell*, 151 Mo. 461. *Hull v. Louth*, 109 Ind. 315. *Dewey v. Allgire*, 37 Neb. 6. *Wirebach v. First National Bank of Easton*, 97 Penn. St. 543, 550, 551. *Gates v. Carpenter*, 43 Iowa, 152. *Campbell v. Campbell*, 35 R. I. 211, 215. *Williams v. Sapiuha*, 94 Texas, 430. *Burke v. Allen*, 29 N. H. 106. *Elder v. Schumacher*, 18 Col. 433. This conclusion is in harmony with those decisions which hold deeds of lunatics void rather than voidable. *Dexter v. Hall*, 15 Wall. 9. *Farley v. Parker*, 6 Ore. 105, 111. *Goodyear v. Adams*, 5 N. Y. Supp. 275, affirmed in 119 N. Y. 650. *Harris v. Jones*, 188 Ala. 633. *McEvoy v. Tucker*, 115 Ark. 430, 436. *Sullivan v. Flynn*, 20 D. C. 396, 401. *Van Deusen v. Sweet*, 51 N. Y. 378, 384. See however, *McCarthy v. Bowling Green Storage & Van Co.* 182 App. Div. (N. Y.) 18, 22, 23. Of course no title whatever can pass by a void instrument.

While it was held in the recent case of *Waltham Co-operative Bank v. Barry*, *supra*, that an attaching creditor was an innocent purchaser for value of land although a mortgage thereon had by mistake been discharged on the margin of the record by the mortgagee, R. L. c. 127, § 34, that case is not authority in support of the contention of the defendant White. *Somes v. Brewer*, 2 Pick. 183, and similar cases, where it is held that conveyances procured by fraud may be set aside, are plainly distinguishable from the case at bar.

We are unable to follow the decisions of courts in other jurisdictions.

dictions which hold that the deed of an insane person cannot be avoided as against a *bona fide* purchaser from his grantee. See *Burch v. Nicholson*, 157 Iowa, 502; *Campbell v. Kerrick*, 142 Ky. 279; *Odom v. Riddick*, 104 N. C. 515; *Greenslade v. Dare*, 20 Beav. 284; *Elliot v. Ince*, 7 De G., M. & G. 475; *Matthiessen & Weichers Refining Co. v. McMahon*, 9 Vroom, 536, 544; *National Metal Edge Box Co. v. Vandever*, 85 Vt. 488; *Coburn v. Raymond*, 76 Conn. 484.

The decree is to be affirmed with costs.

So ordered.

INHABITANTS OF OAK BLUFFS vs. COTTAGE CITY WATER COMPANY.

Dukes County. December 10, 1919. — February 24, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, & JENNEY, JJ.

Municipal Corporations, Contracts. Water Supply. Contract, Construction. Oak Bluffs. Cottage City Water Company.

In a suit in equity by the town of Oak Bluffs against the Cottage City Water Company, organized under St. 1890, c. 151, to enjoin the defendant from charging for water supplied to domestic consumers in the town a rate higher than that stated in the schedule annexed to an agreement between the town and the company, made in 1910, the plaintiff alleged and contended that that agreement provided that the rate stated in its schedules should be maintained by the defendant unchanged for twenty years, and, in determining the case, it was assumed, without so deciding, that the town had authority to enter into a proper contract with the company respecting water rates to be charged for domestic consumption.

Under the authority conferred by a vote of the town of Oak Bluffs authorizing the selectmen to make a contract with the Cottage City Water Company "for public fire hydrant service and water for public uses and purposes substantially as set out in the contract submitted by the Water Co.," the town made a contract with the company, the preamble of which recited that the parties were "desirous of fixing the terms and conditions under which public Fire Hydrant service, and water for public uses and purposes" should "be furnished and regulated during a further period of twenty" years, but made no mention of a purpose to fix rates "for domestic, manufacturing, and other purposes." In the first paragraph the company agreed to maintain in the town for twenty years a complete system of water works for public and domestic uses. The thirteenth paragraph of the contract provided that the company would at once so revise its rates "that the prices to be charged for the use of water for private consumption and the terms thereof shall conform to the schedules therefor an-

nexed hereto, and such service will be governed by and subject to the revised draft of rules and regulations attached thereto, subject to such reasonable additions thereto and amendments and modifications thereof from time to time as shall be found proper and expedient, and the laws of the Commonwealth may permit or require." The sixteenth paragraph fixed a rate to be paid by the town for the use and rental of fire hydrants "all during said term of twenty" years. The seventeenth paragraph declared the town's intent to be further to limit and regulate the rates to be paid by it to the company within the limits of the town "for the period provided herein according to the nature and terms hereof" subject to the provisions of St. 1909, c. 319, and provided further that nothing therein contained should "prevent the parties hereto, if they shall mutually so desire, from reopening negotiations for the amendment and modification of any of the provisions hereof with respect to any matters or question concerning the supplying of water for public or private uses or any of the terms, provisions, or conditions thereof." *Held*, that the rates to be charged to domestic consumers were not fixed by the contract for the entire term of twenty years, and that the company might raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 3, 1919, to enjoin the defendant from charging for water supplied to domestic consumers in the town of Oak Bluffs a rate higher than that stated in a schedule annexed to an agreement, dated April 9, 1910, between the plaintiff and the defendant, described in the opinion, the plaintiff alleging that that agreement provided that such rates should be maintained unchanged for twenty years; and for specific performance of that contract.

The preamble and the first paragraph of the contract were as follows:

"This agreement made and concluded this ninth day of April, A. D. 1910, by and between the Cottage City Water Company, a corporation organized under the laws of the Commonwealth of Massachusetts, Chapter 151, Acts of 1890, party of the first part, and the Town of Oak Bluffs (formerly Cottage City) in said Commonwealth, party of the second part, witnesseth, that:

"Whereas a certain contract entered into November 25, 1889, by and between the Town of Cottage City and Wheeler & Parks, assignors to said Cottage City Water Company, for the construction, operation, and maintenance of a system of water works in said Town, for the extinguishment of fires and for domestic, manufacturing, and other purposes as therein set forth, will expire during the month of June, 1910; and

"Whereas the said parties hereto are desirous of fixing the terms and conditions under which public Fire Hydrant service, and water for public uses and purposes shall be furnished and regulated during a further period of twenty (20) years beginning June 15, 1910;

"Now therefore, in consideration of the agreements, covenants, stipulations and provisions hereinafter set forth, the said party of the first part, the Water Company, hereby agrees with said party of the second part, the Town of Oak Bluffs, as follows, to-wit:

"1. Term and General Scope of Contract. To maintain in said Town of Oak Bluffs for a further period of twenty (20) years from June 15, 1910, the full and complete system of water works now owned and operated by the Company and to supply water for public uses and for domestic, manufacturing, and other purposes; and to enlarge, extend, and otherwise improve the same from time to time conformably to the growing needs of the service, and as herein further provided."

There were seventeen paragraphs. The second paragraph of the contract related to the source and protection of the purity of the water supply. The third and fourth paragraphs related to the character of the pumping machinery and the maintenance and location of a standpipe or water tower. The fifth, sixth, seventh, eighth, ninth, tenth and eleventh paragraphs related to the hydrant service and its maintenance and the maintenance of proper mains and standpipe. The twelfth paragraph related to the restoration of streets, ways, grounds and property dug up by the company in the conduct of its business. The thirteenth paragraph is quoted in the opinion. The fourteenth paragraph related to the installation of a public drinking fountain and of a faucet at a cemetery. The fifteenth paragraph was a provision for plans to be furnished to the town by the company. The sixteenth paragraph fixed the hydrant rental. The seventeenth paragraph is quoted in the opinion.

The defendant demurred to the bill. The demurrer was heard by *Brale*, J., and by his order an interlocutory decree was entered overruling it, from which the defendant appealed.

The suit then was heard by a master. Material facts found by him are stated in the opinion. Both parties filed objections

and exceptions to the report, which related solely to rulings as to evidence and findings of fact. The suit came on to be heard by *Jenney, J.*, and by him was reserved for determination by the full court upon the bill, the answer, the demurrer, the master's report and the objections and exceptions thereto.

S. R. Wrightington, for the plaintiff.

R. A. Stewart, (*F. H. Nash* with him,) for the defendant.

RUGG, C. J. This is a suit in equity whereby the town seeks to restrain the raising of water rates to domestic consumers by the water company on the ground that such action is contrary to a contract between the parties.

The defendant was organized pursuant to St. 1890, c. 151. The power of the town and of the defendant to make contracts touching the subjects of water and water supply is set out in § 5 of that act, in these words: "The said corporation may distribute the water through said town of Cottage City or any part thereof, and may regulate the use of said water and fix and collect water rates to be paid for the use of the same. And said town, or any individual or corporation, may make such contracts with said water company to supply water for the extinguishment of fires and for other purposes as may be agreed upon by said town, individual or corporation, and said Cottage City Water Company. And said water company may receive and hold an assignment of any contract already authorized and entered into by said town with any of the incorporators hereunder, for a supply of water for the extinguishment of fire and for other purposes, whereupon such contract shall be of full force and virtue, binding both the said town and water company." The authority to make a contract with a water company to supply its inhabitants with water for domestic and for all other uses had been conferred upon towns long before the incorporation of the defendant. St. 1873, c. 255, now R. L. c. 25, § 31. *Smith v. Dedham*, 144 Mass. 177, 178. It is assumed for the purposes of this judgment, but without so deciding, that the town had authority to enter into a proper contract with the water company respecting water rates to be charged for domestic consumption.

The contract mentioned in and confirmed by § 5 of said c. 151 expired in 1910 and timely negotiations were had between a committee of the town and the water company respecting terms of

another contract. The result was that such a contract was agreed upon tentatively and at a town meeting held in March, 1910, upon a sufficient article it was unanimously voted that the selectmen were empowered to contract with the water company "for public fire hydrant service and water for public uses and purposes substantially as set out in the contract submitted by the water Co., to this meeting." The pertinent clauses of that contract are as follows: "13. Rates, Rules and Regulations Governing the Use of Water. Upon the execution and final ratification of this contract by both parties thereto, the Company will so revise its Rates, that the prices to be charged for the use of water for private consumption and the terms thereof shall conform to the schedules therefor annexed hereto, and such service will be governed by and subject to the revised draft of rules and regulations attached thereto, subject to such reasonable additions thereto and amendments and modifications thereof from time to time as shall be found proper and expedient, and the laws of the Commonwealth may permit or require." Annexed to the contract are schedules of rates for domestic consumers of water grouped in several classifications.

Paragraph 16 of the contract fixes in detail the prices for the use and rental of fire hydrants, which were to be paid by the town itself, its phrase being "to pay for the rental and use" at the specified rates "all during said term of twenty (20) years."

Paragraph 17 of the contract was in these words: "And the Town of Oak Bluffs hereby determines and declares that it has entered into this contract with the intent and purpose to further limit and regulate the rates and prices to be paid by it to the said Water Company within the limits of said Town for the period provided herein according to the nature and terms hereof, and in so far as it may lawfully act and bind itself herein, subject to the provisions of Chapter 319, Acts of 1909. Nothing herein contained, however, shall prevent the parties hereto, if they shall mutually so desire, from reopening negotiations for the amendment and modification of any of the provisions hereof with respect to any matters or question concerning the supplying of water for public or private uses or any of the terms, provisions, or conditions thereof."

St. 1909, c. 319, above cited, conferred upon the State board of

health power upon complaint by the selectmen of a town or by fifty customers of a water company to "make such recommendations concerning the reduction, modification or continuation of such charges for service" and certain other matters "as the board shall deem just and proper." That act was repealed by St. 1914, c. 787, which conferred upon the board of gas and electric light commissioners power to fix and revise water rates furnished "by corporations and companies" in accordance with the procedure and terms of St. 1914, c. 742, §§ 162, 163.

Rates to private consumers of water were charged in accordance with the schedule annexed to the 1910 contract until 1918, when the water company, after communication with the board of gas and electric light commissioners, increased somewhat its rates to domestic consumers. A second increase was made in 1919, both such increases having been made because the revenue obtained from the rates of 1910 was inadequate to meet its expenses and afford a fair return on its investment. Neither the town nor consumers have made complaint for reduction of these recently established rates under St. 1914, c. 742, § 162.

The chief question to be determined is whether the contract of 1910, according to the correct construction of its terms, purports to fix definitely the rates for domestic consumption for a period of twenty years, unless changed by agreement with the town. The only part of the contract which purports to establish rates for domestic consumption is paragraph 13 quoted above. It is to be noted that there is nothing in that paragraph which by fair intendment fixes rates for any definite period of time. The obligation of the water company therein stated is to "revise its Rates" so that the prices shall conform to the schedule annexed. Instead of saying that the prices so fixed shall be permanent or shall continue for the term of the contract, they are expressly made "subject to such reasonable additions thereto and amendments and modifications thereof from time to time as shall be found proper and expedient, and the laws of the Commonwealth may permit or require." This modifying clause applies to all the preceding part of the paragraph. It is not limited to the "rules and regulations" alone. The only matter therein set forth concerning which there was at that time any specific provision in the laws of the Commonwealth was the subject of charges to be made

and the kind of service to be rendered. It is not rational to exclude "rates" and "prices" from the operation of such laws when otherwise the qualifying clause would have no practical force. "The general rule that a modifying clause is ordinarily to be confined to the last antecedent does not apply where a consideration of the subject matter requires a different construction." *Greenough v. Phoenix Ins. Co. of Hartford*, 206 Mass. 247, 251.

It would be natural that a town and a water company, when entering into a contract for a score of years, should not undertake to fix a rigid rate for domestic consumption for the whole period but should frame their agreement to conform to the existing statutory law providing for inquiry into that subject, in case of dissatisfaction by any party in interest not susceptible of composition by negotiation, by an impartial State board. The words used in this paragraph lend themselves readily to the effectuation of such a normal purpose. To reach any other conclusion would require some wrenching of the sense of language and would attribute no meaning or force to some words of the contract, a result not to be reached unless almost imperatively required. When it was the purpose of the parties to fix the price for a definite period, they knew how to employ unequivocal language to that end. That is manifest from paragraph 16 of the contract where, touching the rental of fire hydrants to be paid by the town, it is said that the rate there established shall continue "all during said term of twenty (20) years." The absence of words of similar import from paragraph 13 of the contract is significantly expressive of a different intent.

This construction is confirmed by paragraph 17, wherein is declared the purpose of "the Town of Oak Bluffs" to be to "limit and regulate the rates and prices to be paid by it to the said Water Company . . . for the period provided herein." The agreement here is confined to "the rates and prices to be paid by it," that is by the town of Oak Bluffs, and does not extend beyond that bound to the rates and prices to be paid by the general public "for the use of water for private consumption." This last phrase used in paragraph 13 shows plainly enough that the parties knew how to describe that class of rate payers when they wanted to refer to them. Even this declaration of purpose is expressly made subject to the provisions of St. 1909, c. 319.

The preliminary part of the contract recites that the "parties hereto are desirous of fixing the terms and conditions under which public Fire Hydrant service, and water for public uses and purposes shall be furnished and regulated during a further period of twenty" years, but omits any reference to an intention to fix the rates "for domestic, manufacturing, and other purposes," a supply of water for which as well as "for public uses" is an obligation assumed by the water company under paragraph 1 of the contract. This declared purpose of the parties conforms to the vote of the town conferring authority to contract with the water company, which as already quoted was for "public fire hydrant service and water for public uses and purposes." "Terms and conditions" for the "public Fire Hydrant service" are fixed by paragraphs 5, 6, 7, 8, 10, 11 and 16 of the contract, while "water for public uses and purposes" in connection with two "public drinking fountains" and "one faucet at or near the entrance to the cemetery of the Town for the use of owners of lots therein," to be furnished by the water company, is required by paragraph 14 of the contract. Thus there is complete satisfaction of the declared purpose of the parties in making the contract and of the vote of the town authorizing the contract without including rates for domestic consumption for any definite period of time.

No private consumer of water was a party to this contract. The town and the water company alone were signatories. It expressly was provided by St. 1909, c. 319, to which the contract is made subject, that fifty customers of the company may complain in writing to the State board of health as to the charges made by the company. It is unlikely that the town and the water company could have intended to bind themselves irrevocably and without opportunity for revision on the initiative of either when there was ever present the right of fifty consumers to start a proceeding for the reduction of rates. Such a stipulation would have been one sided.

The meaning of the contract is that the rates and prices to be charged to the domestic consumers for water was not fixed by the contract rigidly for the entire term of twenty years from 1910, but without infraction of its terms it is open for the water company to attempt to secure under its charter rights as modified by general law a fair return for the service rendered by it to

its domestic and other private consumers and customers, which alone is the avowed purpose of the increases made in 1918 and 1919. See *Donham v. Public Service Commissioners*, 232 Mass. 309, 317.

Bill dismissed with costs.

COMMONWEALTH vs. IMBRIAN HASSAN.

Essex. January 21, 1920. — February 24, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Practice, Criminal, Requests for instructions. Rules of Court.

It is reasonable to require that requests for instructions at a trial for homicide shall be presented before the closing arguments of counsel are begun.

Although the rules of the Superior Court of 1915 by their terms are restricted in operation to civil business of the court, Rule 45, requiring that requests for instructions or for rulings shall be made in writing before the closing arguments unless later special leave is given to present further requests, should be adopted in trials of criminal cases by analogy when applicable. By RUGG, C. J.

It is not error for a judge presiding at the trial of an indictment for manslaughter to refuse to receive requests by the defendant for instructions to be given to the jury if those requests are filed after the closing argument for the defendant and during the argument for the Commonwealth, where the charge to the jury is full and adequate and covers every issue on trial and no contention was made at its close that it was incomplete upon any issue raised at the trial.

It is proper for the judge presiding at a trial for manslaughter to refuse to give to the jury an instruction which is not applicable to the evidence at the trial.

At the trial of an indictment against two defendants jointly charged with manslaughter, each defendant accused the other of the homicide and there was evidence that cartridges containing bullets such as were found in the body of the decedent were found concealed in a shoe of one defendant while he was in jail the day after the homicide. There was no evidence relating to whether there was any explanation by him of this fact at a hearing in the lower court. In the Superior Court, that defendant introduced evidence in explanation. The attorney for the other defendant in effect argued that no explanation of this fact had been given in the "lower court." The district attorney made no such comment. The defendant in whose shoe the cartridges were found made no objection to the argument of the attorney for the co-defendant, but asked in a request for an instruction that his failure to give an explanation in the lower court could not be considered against him, and relied on St. 1912, c. 325. The request was denied and that defendant excepted. *Held*, that the exception must be overruled, because no objection was made at the trial to the argument of the co-defendant and because St. 1912, c. 325, had no application to such argument.

At the trial of an indictment, it is proper to refuse to instruct the jury that "Each juror shall render his own independent judgment and, although giving due consideration to the opinions of the other jurors, he shall not acquiesce in the same or be unduly influenced thereby."

INDICTMENT, found and returned in the county of Essex on January 19, 1919, charging that Imbrian Hassan and Suleman Hassan on October 28, 1918, assaulted and beat Alli Hassan with intent to murder him and by such assault and beating did kill and murder him.

In the Superior Court, the defendants were tried jointly before *Callahan, J.* The district attorney filed a statement that he would no further prosecute the indictment against either defendant in so far as it charged him with murder in the first degree.

At the trial, there was evidence that shortly before the shooting Suleman Hassan had a quarrel with Alli Hassan, who was a brother of the defendant Imbrian, in a coffee house located about fifty yards from the place of the shooting, resulting in Suleman striking him upon the head with a bottle, and that they were separated by other people there.

The contention of Suleman Hassan was that the defendant Imbrian Hassan and his brother Alli left the coffee house ahead of him and proceeded to their lodging house near by, where Imbrian took a revolver out of his trunk and with Alli started back toward the coffee house; that Suleman in the meantime had left the coffee house and was standing upon the sidewalk when the two brothers came toward him, Alli being about twenty feet ahead of Imbrian and unarmed; that Alli took hold of Suleman and he (Suleman) grabbed Alli, and, as they were swinging and wrestling around, Imbrian fired at Suleman, but by mistake shot Alli.

The contention of the defendant Imbrian was that Suleman was ejected from the coffee house by the proprietor, that later Alli left the place for the purpose of securing the arrest of Suleman for assault; that as he approached Suleman he said, "I am going to the court or police station to have you arrested for what you did;" and that Suleman replied "Do you suppose that I am going to let you go to the police station?" and immediately put his hand in his pocket and pulled out a revolver and shot Alli.

There also was evidence that on the day following the shooting,

while the defendant Imbrian was in jail, an officer discovered two cartridges hidden in his shoe. At the trial in the Superior Court, the defendant Imbrian offered an explanation of the presence of the cartridges in his shoe. The bill of exceptions states, "The attempt to conceal the cartridges was given much weight in their arguments by the attorney for Suleman and the district attorney." A part of the argument of the attorney for Suleman was as follows:

"They (attorneys for Imbrian) knew where Abraham (Imbrian) put the cartridges, and so, hard put to it, they have evolved a certain scheme. Usually when a case is tried in the lower court or when a complaint is made in the lower court an attempt is made to keep a man from going to jail upon a charge of first degree murder, because if the charge of first degree murder is sustained — that is, if the court finds probable cause to believe that he is guilty — he will be held for action by the grand jury. During the period that he is held, he will not be admitted to bail and usually, if counsel have anything in the way of evidence that is convincing, that can explain away that possible appearance of guilt against the client, they are produced; and we tried this case pretty fully in the lower court. So [counsel for Imbrian] . . . know that they have got to have some explanation of the bullets in the shoe, and I waited with considerable patience to find out what it was going to be, and the answer came when the opening for the defendant was made. . . . That was that a young outlaw from the West, a nephew (Kako) of Abraham (Imbrian) Hassan's, had come on here to your peaceful community, and had brought with him the gun for business, if necessary, and the blackjack for pleasure was his testimony."

Counsel for the defendant Imbrian did not interrupt the attorney for Suleman during this argument and made no objection to the line of argument during the argument or at the close thereof. The district attorney in his argument made no comment on the failure of the defendant Imbrian to offer an explanation of the presence of the cartridges before the trial.

Other evidence and the circumstances under which the defendant Imbrian Hassan presented to the judge certain requests for instructions are described in the opinion.

In the course of the charge, the judge instructed the jury as follows:

"Now if Suleman fired the fatal shot, you need give no heed to

what I am about to say. It is the theory of Suleman that Imbrian with the revolver in his hand, observing a struggle between Suleman and Alli, the latter of whom was hit upon the head by a bottle by Suleman some time before, determined to kill Suleman, fired, and by accident slew his own brother Alli.

"What is the legal status of the perpetrator of a homicide in such circumstances? The law's solicitude for human life is so great that if one man slay another by accident while he is unlawfully slaying or attempting to slay a third, the intent with which he acts against his intended victim is transferred to and made a part of the accidental act and he is held guilty in the same degree as he would have been held if his purpose against his intended victim had been accomplished.

"So here, if you should find that Alli was in fact killed by Imbrian by accident while he, Imbrian, was attempting to kill Suleman, it would be your duty to find him guilty of murder as charged in this indictment, or of manslaughter, — of murder if there was malice aforethought in the act, of manslaughter if the homicide was committed in the course of a combat or under great and sudden provocation."

The jury found the defendant Suleman Hassan not guilty, and found the defendant Imbrian Hassan guilty of manslaughter; and the defendant Imbrian Hassan alleged exceptions.

St. 1912, c. 325, is as follows: "At the trial of a criminal case in the Superior Court, upon indictment or appeal, the fact that the defendant did not testify at the preliminary hearing or trial in the lower court, or that at such hearing or trial he waived examination or did not offer any evidence in his own defence, shall not be used as evidence against him, nor be referred to or commented upon by the district attorney or other prosecuting officer."

E. J. Carney, (*C. A. Green* with him,) for the defendant.

D. C. Manning, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. The defendant was indicted jointly with one Suleman Hassan for the murder of Alli Hassan, a brother of the defendant. He was found guilty of manslaughter and Suleman Hassan was acquitted. There seems to have been little if any controversy at the trial concerning the fact that Alli Hassan was killed by the shot of a revolver feloniously fired by one of the

other of the two persons indicted. Each attempted to put the blame upon the other.

During the argument of the district attorney, counsel for the defendant handed thirteen written requests for instructions to the clerk of the court, who presented them to the presiding judge. Counsel for the defendant neither said nor did anything further about the requests until after the charge, when he orally called the attention of the judge to his failure to give requests numbered 4, 7 and 13. The judge refused to consider them on the ground that they were not seasonably presented. No exception was taken to the charge in any particular, but exception was saved to the refusal to grant these three requests.

Comprehensive codes of rules of the Superior Court were adopted in 1859, 1874, 1886, 1900, 1906 and 1915. The first reference to the subject of requests for rulings appears in Rule 37 of those adopted in 1874. It is that "All requests for instructions shall be made in writing." It appears in the same form in Rule 50 of the rules of 1886. In Rule 48 of the rules of 1900 words were added so that then it read, "All requests for instructions shall be made in writing before the closing arguments unless special leave is given to present further requests later." In Rule 45 of the rules of 1906, the form is as follows: "Requests for instructions or for rulings in trials with or without jury shall be made in writing before the closing arguments unless special leave is given to present further requests later." In the rules of 1915 substantially the same form occurs. The rules of 1915 alone of these several codes of rules appear by their terms to be restricted in operation to civil business of the court.

So far as we are aware, there never has been an express rule of the Supreme Judicial Court requiring requests for instructions to be in writing and handed to the presiding justice before arguments. It has been the established practice of this court for many years that no party as matter of right may present requests for instructions in any other way or at any other time than in writing and before arguments.

Before the adoption of any formal rule in the Superior Court, it had become the settled and recognized practice that requests for instructions could as matter of right be presented only before argument. As early as 1846, in *Dole v. Thurlow*, 12 Met. 157,

at page 164, the practice was declared by Chief Justice Shaw to be that requests for rulings at the close of the charge were too late and that they ought to be presented in season at least to apprise adverse counsel of views of the law contended for. Manifestly this could be done only by bringing them forward before arguments. It was so stated in express terms by Chief Justice Gray in *Ela v. Cockshott*, 119 Mass. 416, in 1876. In *McMahon v. O'Connor*, 137 Mass. 216, it was said by Mr. Justice Holmes in 1884 that "It is the undoubted right of parties to present requests for rulings and to have them passed upon. But the right is not infringed by requiring it to be exercised in a reasonable way." Whether and how to deal with requests presented after the beginning of arguments was said according to settled practice to rest in the discretion of the trial judge. In *Brick v. Bosworth*, 162 Mass. 334, are found these words by Mr. Justice Knowlton: "a party must seasonably present a request in writing to the judge, and the ordinary rule of practice which has been approved by this court is that such a request must be made before the arguments."

This salutary rule of practice prevails in the trial of criminal cases. It was recognized as relevant in *Commonwealth v. Boutwell*, 162 Mass. 230.

It is obviously reasonable that requests for instructions, if they are to be an aid in the administration of justice in the trial both of criminal and civil cases, ought to be presented before the arguments. It is essential that the judge be given adequate opportunity to pass upon the soundness of requested rulings. In many cases it is of importance that counsel may know what is likely to be the instruction of the judge upon controverted questions of law, so that remarks to the jury may be shaped accordingly.

Even though the rule of court does not in terms relate to criminal cases, it should be adopted in such trials by analogy when applicable. Uniformity in practice is highly desirable so far as reasonably practicable. See *Strout v. United Shoe Machinery Co.* 215 Mass. 116, 119, and *Renwick v. Macomber*, 233 Mass. 530, 534. It is manifest from this review of decisions that the rule of the Superior Court respecting the time for presentation of requests for rulings aims at scarcely more than the embodiment of the general practice existing without express rule.

The rule of court and the general practice apart from rule do not

prevent the presiding judge from receiving and passing upon requests presented at any time before the jury retire, if he elects to do so. But he is under no obligation so to do. *Robertson v. Boston & Northern Street Railway*, 190 Mass. 108. *Pelatoski v. Black*, 213 Mass. 428.

Doubtless in the trial of indictments charging crimes the judicial conscience would be peculiarly sensitive to see that no error of omission or of commission in his charge should go unremedied. But it would give ground for great abuses if requests for instructions could be presented as of right after the beginning of arguments.

The assumption may be indulged that the salient points of the case will be adequately covered by the charge; but if at its close, substantial omissions or errors are observed, the attention of the judge may be drawn to them, and upon refusal or neglect to give correct and adequate instructions upon important factors in the case, the right to exceptions thus adequately protects the rights of parties. *Brick v. Bosworth*, 162 Mass. 334, 338.

There was no error in refusing to receive the requests under the circumstances here disclosed. The charge was full and adequate, covering every issue in the case. No contention was made at its conclusion that it was incomplete upon any question raised at the trial.

If (without establishing any precedent for the future) the requests be considered on their merits, no error is shown. The fourth request, to the effect that if the defendant under a reasonable belief that his brother was in immediate danger at the hand of Suleman Hassan, shot at the latter and by mistake killed his brother, he was not guilty, was not applicable to the evidence. Such an issue does not appear to have been tried. *Plummer v. Boston Elevated Railway*, 198 Mass. 499, 516. *Commonwealth v. Boutwell*, 162 Mass. 230, 232.

The seventh request was to the effect that failure of the defendant to explain the presence of cartridges in his shoe at the lower court trial could not be considered against him. Reliance is placed upon St. 1912, c. 325, which provides that failure to testify or to offer evidence in the lower court shall not be used as evidence against a defendant in the Superior Court or commented on by the district attorney or other prosecuting officer. No evidence

appears to have been offered on the point, but counsel for Suleman Hassan, indicted jointly and tried with the defendant, made reference to the subject in his argument. If this was regarded as improper, the attention of the judge should have been called to it at once. *Commonwealth v. Richmond*, 207 Mass. 240, 250. *London v. Bay State Street Railway*, 231 Mass. 480, 486. Moreover, no argument whatsoever was made upon the point by the district attorney or prosecuting officer who alone is within the purview of the statute. It does not apply to arguments made in behalf of a co-defendant. *Commonwealth v. Goldstein*, 180 Mass. 374.

The thirteenth request that "Each juror shall render his own independent judgment and, although giving due consideration to the opinions of the other jurors, he shall not acquiesce in the same or be unduly influenced thereby," manifestly was unsound and inapposite. *Commonwealth v. Tuey*, 8 Cush. 1. *Highland Foundry Co. v. New York, New Haven, & Hartford Railroad*, 199 Mass. 403. *Simmons v. Fish*, 210 Mass. 563, 570, 571.

Exceptions overruled.

WILLIAM I. MONROE, executor, *vs.* HELEN S. COOPER, administratrix *de bonis non* with the will annexed.

Suffolk. January 22, 1920. — February 24, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Probate Court, Appeal. Words, "Person who is aggrieved."

A creditor of a deceased person is not a "person who is aggrieved" by a decree of the Probate Court allowing a will of his debtor and is not given by R. L. c. 162, § 9, a right of appeal therefrom.

Whether under any circumstances a creditor of a deceased person would have a right of appeal from a decree of the Probate Court upon a petition under R. L. c. 137, § 1, cl. 3, giving "one or more of the principal creditors" of a deceased person a right to petition for administration of his estate, was not determined.

APPEAL by Frederick F. Read from a decree of the Probate Court for the County of Suffolk allowing the will of Elizabeth T. Marshall, late of Boston.

While the appeal was pending, Frederick F. Read died and Emma S. Read, appointed executrix of his will by the Surrogate's

Court for the County of New York, in the State of New York, was admitted to prosecute the appeal in his stead.

The appellee moved that the appeal be dismissed on the ground that the appellant had no beneficial interest in the estate of the testatrix and was not aggrieved by the decree appealed from. The motion was heard by *Loring, J.*, and was allowed; and by his order a final decree was entered dismissing the appeal and remanding the case to the Probate Court for further proceedings. The executrix of the will of Frederick F. Read appealed.

Subsequently, the executrix of the will of Frederick F. Read died and Helen S. Cooper was appointed administratrix with the will annexed of the estate of Frederick F. Read not already administered and was admitted to prosecute the appeal.

H. H. Ballard, Jr., for the appellant.

H. D. McLellan, for the appellee.

Rugg, C. J. The single question presented on this record is, whether one having no other interest than that of a creditor has a right to appeal from a decree of the Probate Court allowing the last will and testament of his deceased debtor. The decision must turn on the point whether such creditor is a "person . . . aggrieved" by such a decree. Only persons so aggrieved are given the right to appeal under R. L. c. 162, § 9.

Numerous cases have arisen calling for the definition of the words "person . . . aggrieved" as used in this statute in their application to various states of facts. It is not necessary to review these decisions. It is enough to say that in order for one to be aggrieved in this sense, it must appear that he has some pecuniary interest, some personal right, or some public or official duty resting upon him, affected by the decree. *Smith v. Bradstreet*, 16 Pick. 264. *Lawless v. Reagan*, 128 Mass. 592, 593. *Leyland v. Leyland*, 186 Mass. 420. *Ensign v. Faxon*, 224 Mass. 145. *Hayden v. Keown*, 232 Mass. 259. *Kline v. Shapley*, 232 Mass. 500. *Crowell v. Davis*, 233 Mass. 136.

Whether his debtor dies testate or intestate is a matter of no substantial interest to any creditor. The property of a decedent must be applied to the payment of his debts before either next of kin or heirs at law in the case of intestacy, or the legatees or devisees of a testator, can share in his estate. A will cannot give to either devisee or legatee rights superior to a creditor. It follows

that a creditor is not aggrieved in any legal signification by the allowance of the will of his debtor. See *Putney v. Fletcher*, 140 Mass. 596, *Nesbit v. Cande*, 206 Mass. 437, *Swan v. Tapley*, 216 Mass. 61, for somewhat analogous cases.

It is not necessary to determine whether circumstances may arise, in view of R. L. c. 137, § 1, giving "one or more of the principal creditors" a right to petition for administration upon the estate of a deceased person, whereby a creditor may be a person aggrieved by a decree appointing an administrator. No intimation is made on that point. See *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Bradstreet*, 16 Pick. 264; *Smith v. Sherman*, 4 Cush. 408; *Lawless v. Reagan*, 128 Mass. 592.

Decree affirmed.

CHARLES J. MARTELL vs. JOHN J. DOREY & others.

Suffolk. December 1, 2, 1919. — February 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Equity Pleading and Practice, Appeal, Amendment, Decree *nunc pro tunc*.
Superior Court. Evidence, Presumptions and burden of proof, Of fraud.
Equity Jurisdiction, To reach and apply property conveyed in fraud of creditors.

After an appeal from a final decree of the Superior Court in a suit in equity had been entered in this court, it was, on motion before argument, discharged and, in the Superior Court, a motion was allowed, as of a date preceding the entry of the final decree, amending the bill so that the findings of the trial judge and the final decree conformed to the allegations of the bill as amended in a particular which had been fully tried when the suit was heard upon the merits. *Held*, that the Superior Court had no power to allow such an amendment.

Upon the return to this court of the record in the suit above described with the action of the judge of the Superior Court and the amendment appended thereto, it was *held* that the case must be considered only upon the record as presented by the original appeal from the final decree.

When a suit in equity comes before this court upon an appeal from a final decree with a report of the evidence, the powers of this court for the accomplishment of justice are extensive and include power to order or to authorize amendments to pleadings. By RUGG, C. J.

An appeal from a final decree of the Superior Court in a suit in equity, where the evidence was in part oral and was taken and reported by a commissioner appointed under Equity Rule 35, brings both questions of fact and questions of law for revision to this court, who must examine the evidence and decide the

case according to their own judgment, giving due weight to findings of the trial judge, whose decision, based upon the hearing of oral testimony, will not be reversed unless plainly wrong.

At the hearing of a suit in equity to reach and apply in payment of a judgment debt securities of the judgment debtor alleged to have been placed by him, in fraud of his creditors, in the hands of a second defendant, both defendants testified orally. There was evidence tending to show that during a period of about four years seven different certificates for an aggregate of two hundred and seventy-five shares of the preferred stock of a certain corporation had been issued to the second defendant, that two hundred of these shares were transferred through several intermediaries to the judgment debtor, leaving seventy-five shares in the name of the second defendant; that during this time the judgment debtor was entangled in much litigation which ultimately might involve him in considerable financial liability, part of which concerned proceedings instituted by his wife, and that some securities, other than those above described, had been conveyed by the judgment debtor to the second defendant in alleged payment of a note which might have been found not to represent genuine indebtedness. The trial judge found that the seventy-five shares of preferred stock remaining in the name of the second defendant were the property of the judgment debtor and were issued to the second defendant under an agreement or understanding between him and the judgment debtor, with the purpose of concealing the true ownership through a secret trust and in fraud of creditors, and that the shares were held by the second defendant without consideration. Upon an appeal from a final decree for the plaintiff, the entire evidence being reported, it was *held*, that the judge's finding could not be said to be plainly wrong.

It is not necessary, in order to maintain a suit in equity to reach and apply, in payment of a debt owed to the plaintiff, property of the debtor conveyed by him in fraud of his creditors, that the plaintiff should have been a creditor at the time of the fraudulent conveyance.

Allegations in a bill in equity in the Superior Court to reach and apply, in payment of a judgment debt, property conveyed by the judgment debtor to others in fraud of his creditors, were that the judgment debtor owned two hundred and eleven shares of stock in a certain corporation, "evidenced by certain certificates, among which are certificates numbered . . . [giving the numbers] . . . or by certificates which have been issued in the place of said certificates," which stock was bought in the name of a second defendant under an agreement in fraud of the debtor's creditors, that the second defendant "now holds a part of said stock under said agreement," and that other defendants severally held other parts "of said stock" under like agreements. At the trial, the second defendant was inquired of as to seventy-five shares of stock of the corporation in question, which were represented by certificates in his name but bearing numbers other than those stated in the bill and express notice was given that the plaintiff contended that those seventy-five shares belonged to the judgment debtor. No objection was made to the examination nor was any suggestion made that the defendant during the trial had no sufficient opportunity to produce evidence to controvert the plaintiff's contention. A decree was made, upon findings warranted by the evidence, that the seventy-five shares might be reached and applied to satisfy the judgment debt. Upon an appeal from the final decree, it was *held* that a motion should be allowed

in the Superior Court to amend the bill to include the particular certificates described in the final decree and that, upon such amendment being allowed, the decree should be affirmed.

BILL IN EQUITY, filed in the Superior Court on June 29, 1917, and afterwards amended, against John J. Dorey, Willard B. Bryne, Caroline E. Manton, Ida E. Small, the Exchange Trust Company, G. Wallace Tibbetts and the American Sugar Refining Company, to reach and apply in satisfaction of debts amounting to \$4,242.40 and interest owed to the plaintiff by the defendant Dorey, property conveyed by him to and held by the defendants Bryne, Manton, Small, the Exchange Trust Company and Tibbetts in fraud of the creditors of Dorey.

The third paragraph of the bill read as follows:

"3. That the defendant John J. Dorey is the owner of two hundred and eleven shares of the stock of The American Sugar Refining Company, . . . which stock is evidenced by certain certificates, among which are certificates numbered 'K-5890, J-48522, J-48523 and E-3339,' or by certificates which have been issued in the place of said certificates, which stock was bought in the name of the defendant Willard B. Bryne under an agreement between said defendants entered into for the purpose of concealing the true ownership and in fraud of creditors, and the plaintiff is informed and believes, and therefore avers, that the said Willard B. Bryne now holds a part of said stock under said agreement."

Later paragraphs contained allegations that the defendants Manton and Small severally held parts "of said stock belonging to the defendant John J. Dorey under an agreement that she [he] shall so hold it in order to conceal its true ownership and in fraud of creditors;" that the Exchange Trust Company held certain shares of stock of the same corporation belonging to the defendant Dorey "under a secret trust," and that the defendant Tibbetts had standing in his name or in his possession or under his control certain stock of the same corporation, among other securities, belonging to the defendant Dorey "under a secret trust and which cannot be come at to be attached."

The bill was taken *pro confesso* as to the defendants Dorey, Manton, Small and the American Sugar Refining Company. The other defendants filed answers. The suit was heard upon its merits by J. F. Brown, J., a commissioner having been appointed

under Equity Rule 35 to take the evidence. Material evidence and facts found by the judge are described in the opinion.

A final decree was entered directing the defendant Dorey to pay to the plaintiff the amounts of the judgment debts, interest and costs, and that, upon his failing to do so, a special master should sell "at private sale or public auction the twenty-five shares of preferred stock of the American Sugar Refining Company evidenced by certificate J-24271, dated May 20, 1908, and the fifty shares of preferred stock of the American Sugar Refining Company evidenced by certificate J-28666, dated November 15, 1909," and pay from the proceeds of the sale the amount ordered to be paid to the plaintiff, and pay the balance, if any, to the defendant Bryne, the defendant Bryne being ordered to deliver the certificates to the special master, and the American Sugar Refining Company to make the necessary transfers. The defendant Bryne appealed.

After the entry of the appeal in the Supreme Judicial Court, but before it was argued, it was discharged on motion and in the Superior Court *J. F. Brown, J.*, allowed, as of April 11, 1919; the day before the entry of the final decree, an amendment presented by the plaintiff amending the third paragraph of the bill so that it should read as follows:

"3. That the defendant John J. Dorey is the owner of shares of stock of the American Sugar Refining Company, a corporation duly organized according to law and having a usual place of business in Boston, which stock was bought in the name of the defendant Willard B. Bryne under an agreement between said defendants, entered into for the purpose of concealing the true ownership in fraud of creditors, and the plaintiff is informed and believes, and therefore avers, that the said Willard B. Bryne now holds a part of said stock under said agreement."

The defendant Bryne appealed from the decree allowing such amendment.

C. G. Morse, (*R. C. Van Amringe* with him,) for the defendant Bryne.

C. J. Martell, pro se.

RUGG, C. J. This is a suit in equity by a judgment creditor of John J. Dorey, who is the principal defendant. Various persons were named as defendants. The only one now sought to be

charged is Willard B. Bryne. The suit is brought to reach and apply, in payment of the plaintiff's debt, property of the defendant which cannot be attached or taken on execution in an action at law and which has been placed in the hands of Bryne in fraud of the creditors of Dorey. Final decree was entered in favor of the plaintiff. *Rioux v. Cronin*, 222 Mass. 131. The defendant Bryne appealed.

While the case was pending before the full court on appeal from a final decree, but before argument, the appeal was discharged on motion. Then an amendment to the bill was allowed by a judge of the Superior Court, permitting the plaintiff to allege that certain shares of stock not described in the original bill were in fact owned by Dorey and were held by Bryne in fraud of the rights of the plaintiff. The allowance of such an amendment was beyond the power of the Superior Court. A final decree in equity had been entered. Thereafter that court had no further power to deal with the case, except on review, save in exceptional instances of which this is not one. *Thompson v. Goulding*, 5 Allen, 81, 82. *White v. Gove*, 183 Mass. 333, 340. *Shannon v. Shepard Manuf. Co.* Inc. 230 Mass. 224, 229, and cases collected. The record fails to show that this was a proper case for the allowance of an amendment *nunc pro tunc*. *Perkins v. Perkins*, 225 Mass. 392. When a suit in equity comes before this court on appeal from final decree with report of evidence, the powers of this court, in order to accomplish justice, are extensive and include that to order or authorize amendments to pleadings. The whole case is before this court to be disposed of as it ought to have been disposed of by the judge who heard the case and entered the decree. If it appears on the record that the decree is broader than the allegations of the bill and yet that there has been a full and fair trial, appropriate amendments may be ordered made in order to comply with the rule that the decree must conform to and not be in excess of the pleadings. In *Old Corner Book Store v. Upham*, 194 Mass. 101, a final decree was entered in the court below, and the case came before us on appeal with a report of all the evidence. It there was said at page 106, "it is competent for this court in the exercise of its discretion to order all the necessary amendments to be made in the pleadings to meet the case made out on the evidence." For other cases which have come up on appeal from final decree and in

which amendments have been allowed or ordered by this court, see *Collins v. Snow*, 218 Mass. 542; *Hayes v. Penn Mutual Life Ins. Co.* 222 Mass. 382, 389; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 199 Mass. 488. For amendment in action at law on appeal from judgment, see *Noble v. Brooks*, 224 Mass. 288.

It follows that the case must be considered on the record presented by the original appeal from the final decree. The proceedings in the Superior Court after the discharge of the appeal, and before the re-entry of the case in this court, including the affidavits, must be disregarded as having been irregular and without jurisdiction.

The case was heard by a judge of the Superior Court on answers to interrogatories and oral testimony. The evidence is reported by a commissioner. The judge made a finding of facts. Such an appeal brings before this court for revision questions of fact as well as of law. It is our duty to examine the evidence and to decide the case according to our own judgment, giving due weight to the finding of the judge whose decision, based upon the hearing of oral testimony, will not be reversed unless plainly wrong. *Lindsey v. Bird*, 193 Mass. 200. *Jennings v. Demmon*, 194 Mass. 108.

The only finding of fact by the judge of the Superior Court now disputed is that "the defendant William B. Bryne holds in his possession and control and as record owner seventy-five shares of the preferred stock of the American Sugar Refining Company, evidenced by two certificates, one numbered J-24271, dated May 20, 1908, for twenty-five shares, and the second numbered J-28666, dated November 15, 1909, for fifty shares, which stock is the property of the defendant John J. Dorey, and was issued in the name of the defendant Willard B. Bryne under an agreement or understanding between the defendant John J. Dorey and the defendant Willard B. Bryne with the purpose of concealing the true ownership through a secret trust in fraud of creditors, and that said stock is held by said Bryne without consideration."

A careful examination of the evidence convinces us that these findings cannot be pronounced plainly wrong. This is one of the cases where much may have depended upon the appearance and

manner of giving of testimony by Bryne, a witness at the trial. There was no direct and categorical evidence to the effect that stocks and property of Dorey were placed in the hands of Bryne in fraud of creditors upon a secret trust. That is not necessary in order that a plaintiff make out his case and is not usually obtainable in cases of this sort. It is enough if the relations of the parties and their conduct toward property affords fair ground for inference of the fraudulent purpose and the secret trust, notwithstanding their positive denials of improper purpose. Here, as in other branches of the law, mere disbelief of testimony as to facts is not affirmative proof of contrary facts. *Wakefield v. American Surety Co.* 209 Mass. 173, 177. *Cruzan v. New York Central & Hudson River Railroad*, 227 Mass. 594, 597. There was evidence which, if believed, tended to show that at about the time when the stock in question came into the hands of Bryne, the defendant Dorey was entangled in a good deal of litigation which ultimately might involve him in considerable financial liability. Although a part of this concerned proceedings instituted by his wife, voluntary conveyances of property by the husband might have been found to be fraudulent under *Shepherd v. Shepherd*, 196 Mass. 179, notwithstanding *Willard v. Briggs*, 161 Mass. 58. There were also controversies with other parties pending or threatened. Both Bryne and Dorey admitted that seventy-five shares of common stock in the American Sugar Refining Company had been transferred from Dorey to Bryne in alleged payment of a note which might have been found not to represent genuine indebtedness. There were denials by both that there were any other transactions between the two respecting stock in that corporation. There was, however, evidence that within a period of about four years seven different certificates for an aggregate of two hundred seventy-five shares of the preferred stock of that company were issued to Bryne, of which two hundred shares may have been found to have been transferred through several intermediaries to Dorey. The inference that the remaining seventy-five shares still standing in the name and in the possession of Bryne, certificates for twenty-five shares of which had been issued on the same day as some of those transferred to Dorey, also belonged to Dorey, cannot be pronounced irrational or plainly wrong in view of these circumstances and other evi-

dence disclosed in the record, which need not be narrated in detail.

It does not appear that the plaintiff was a creditor of Dorey at the time of the transfer, which has been found to have been fraudulent. That circumstance, however, does not prevent him from maintaining this suit. Subsequent creditors may avoid a transfer of property with fraudulent purpose upon a secret trust. *Plimpton v. Goodell*, 143 Mass. 365, 367.

The question of the title to these seventy-five shares of preferred stock appears to have been seasonably brought to the attention of Bryne and fairly tried. The allegation of the bill was that Dorey was the owner of two hundred and eleven shares of the stock of the American Sugar Refining Company, "which stock is evidenced by certain certificates, among which" were designated by number several certificates but not including those representing the seventy-five shares found to belong to Dorey and to stand in the name of Bryne. This enumeration of certificates did not purport by its terms to be inclusive. It covered two hundred eleven shares, whatever may have been the numbers of the certificates. Questions were asked about all certificates by interrogatories to Bryne and to Dorey and were answered without objection. During the first day of the trial inquiry was made of Bryne while under examination concerning these particular seventy-five shares, and express notice given of the contention that they belonged to Dorey. No objection was made to the examination, no suggestion offered that the intervening night while the trial was in progress was not long enough to enable Bryne to produce his checks and stubs and other evidence that he was the real owner of these shares, and no motion was made for continuance or suspension of trial because of surprise on this point.

We are of opinion that a motion for amendment to the bill, so as to include these particular certificates aggregating seventy-five shares, should be allowed. Upon allowance of such amendment, the decree may be affirmed with costs.

So ordered.

FRANCES ENTIN vs. EDWIN H. EVANS.

Bristol. January 5, 1920. — February 25, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Mortgage, Consideration. Bona Fide Purchaser. Conversion.

A mortgage of goods, given to secure the payment of a note which bore the same date as the mortgage and which was delivered to the mortgagee upon his surrendering several overdue and unpaid notes previously given to him by the mortgagor for sums of money lent by the mortgagee on the dates of the several notes, is supported by a valuable consideration.

One, who in good faith and without notice of any fraud on the part of the mortgagor received a mortgage of goods, which was given to him upon his surrendering overdue and unpaid notes previously given to him by the mortgagor for sums lent from time to time before the giving of the mortgage, may maintain an action of tort for conversion of the goods against a sheriff whose deputy had seized and, after a demand by him, had retained the goods upon a writ of replevin brought against the mortgagor by one who had sold the goods to the mortgagor and had rescinded the sale by reason of the mortgagor's fraud.

Tort against a deputy sheriff for the conversion of goods mortgaged to the plaintiff. Writ dated August 19, 1914.

In the Superior Court the action was tried before *King, J.* The material evidence is described in the opinion. At the close of the evidence, the plaintiff asked for several rulings of law and alleged exceptions to a refusal of the judge to give the following:

"18. Purchaser includes mortgagee.

"19. Value is any consideration to support a simple contract. An antecedent or pre-existing claim whether for money or not, constitutes value where goods are taken in satisfaction or as security therefor."

The plaintiff also excepted to the following portion of the charge to the jury:

"Now she [the plaintiff] has the right to stand in the position of what we call in law a *bona fide* purchaser for value without notice for whatever money she advanced after she got the mortgage or at the time of the mortgage and because of the mortgage, but not to rely on that for money which she advanced theretofore. Now, the law is explicit in this respect. I read you what

was said by our Supreme Judicial Court in the leading case on that subject [*Goodwin v. Massachusetts Loan & Trust Co.*], 152 Mass. 189, at page 199: 'Whatever may be the law in the case of a transfer of chattels in payment of a pre-existing debt, when the debt is thereby discharged, we think that by the weight of authority a pledging of chattels as security for a pre-existing debt, when there is no present consideration whatever for the pledge, does not constitute the pledgee a holder for value, within the meaning of the rule we are considering.' Now, applying that to this case, Miss Entin has testified that she advanced various sums of money, twenty-four in all, and she has named them; she says they began January 26, 1912, long before this mortgage was executed; and she says they continued down to January 2, 1914; and that two of the loans were made December 4, 1913, that is the day the mortgage is dated. Now of those loans, if they are loans, if they were *bona fide*, — and by putting it with an 'if' I don't mean to cast any doubt upon it — twenty-one of the twenty-four purport to have been loans made before the mortgage was given. Then the mortgage was given to cover those for a pre-existing debt. And as to those times she was not a *bona fide* purchaser for value without notice, because the law so says; this being a contest between creditors. As to the two loans claimed to have been made on December 4, 1913, those do put her in the position of a *bona fide* purchaser for value, if she made the loans and she says they were \$50 each; and one January 2, 1914, \$26. Then if you say that Miss Entin knew nothing about the fraudulent statements made by Stollin, if he made them to Elias and Company and if you say that you believe her, that she did make loans to Stollin in good faith, and without any notice of the alleged fraud committed by Stollin, then she is a *bona fide* purchaser for value, without notice, as to so much money as she advanced or loaned to Stollin at the time the mortgage was given and thereafter relying upon it; and those amount to \$126. To that extent, if you so find it was *bona fide*, if she had no notice of the fraud of Stollin, if he was guilty of fraud to Elias and Company then she is entitled to prevail to that extent, but not as to the twenty-one payments which she claims she had made before she took the mortgage, and which were, in law, what we call a pre-existing debt. She is not a *bona fide* purchaser as to that, for so our Supreme Judicial Court says."

There was a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

C. A. MacDonald & B. Cook, Jr., for the plaintiff.

A. G. Weeks & J. F. O'Brien, for the defendant.

CROSBY, J. This is an action of tort for the conversion of certain goods, brought by a mortgagee against the defendant, a sheriff, whose deputy took possession of them on a writ of replevin in which Joseph Elias and Company was named as plaintiff and Harry Stollin as defendant. A written demand for the goods was made by the plaintiff in this action on the deputy sheriff.

In July, 1913, Stollin purchased a carload of glass from Joseph Elias and Company and thereafter made payments on account. There was evidence that when the glass was sold Stollin stated that "he owned the business, that it was not mortgaged, and that [he] . . . promised he would not mortgage the business." There also was evidence that the plaintiff at various times between January 26, 1912, and January 2, 1914, lent to Stollin sums of money amounting in all to \$1,006.41; that these loans, except the last three, were evidenced by promissory notes payable on demand. On December 2, 1913, Stollin and his wife gave to the plaintiff a promissory note for \$1,000 payable in six months from date, and secured by a mortgage of his stock of goods. The note and mortgage were executed and the mortgage was recorded on the same day. The plaintiff testified that she had previously loaned Stollin \$880, and held twenty-one of his notes aggregating that amount which she returned to him upon receipt of the note and mortgage for \$1,000. The judge of the Superior Court ruled that the mortgage was given to secure a pre-existing debt so far as it related to the amount due at the date of the mortgage, and for that indebtedness the plaintiff was not entitled to recover. He instructed the jury, in substance, that if the last three loans (amounting to \$126) were made at the time the mortgage was given or thereafter, and were so made by the plaintiff in good faith without any knowledge on her part of fraud committed by Stollin, she was a *bona fide* purchaser for value and could recover. The jury returned a verdict for the defendant.

The plaintiff saved several exceptions, all of which are now waived except those relating to the refusal of the judge to give

the eighteenth and nineteenth requests, and to that portion of the charge in which the jury were instructed that the plaintiff could not recover for loans made before the mortgage was given. This instruction evidently was based upon *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, from which the judge quoted in his charge. Although in that case it was held that the pledging of chattels as security for a pre-existing debt, when there is no present consideration for the pledge, does not constitute the pledgee a holder for value, we are of opinion that the facts there in question are plainly distinguishable from those in the case at bar. In the present case the plaintiff testified that when the note and mortgage were given to her by Stollin, she returned to him the twenty-one notes representing the \$880 previously loaned, and gave him two checks of \$50 each, which he cashed. If this evidence was believed by the jury it could have been found that the mortgage was supported by a valuable consideration, and if the loans were made without knowledge on her part of any fraud of Stollin it was valid at common law. While there was a verdict for the defendant, it does not appear on what ground it was rendered; the jury may have found that the three loans were not made by the plaintiff, but she was not precluded from recovering at common law for any loans which she could prove had been made before the date of the mortgage, in good faith and for a present consideration. In view of what we have said, it is unnecessary to determine whether the eighteenth and nineteenth requests should have been given, or whether the law as it previously existed was changed by the sales act. St. 1908, c. 237.

Exceptions sustained.

EMMA C. CHESTNUT vs. CARLETON SAWYER.

Norfolk. January 12, 1920. — February 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Practice, Civil, Exceptions, Conduct of trial: judge's charge.

In the bill of exceptions saved by the plaintiff at the trial of an action for personal injuries caused by slipping on ice alleged to have accumulated, by reason of the defendant's negligence, upon land of the defendant adjacent to the ap-

proach to a post office which occupied under a lease a portion of a building of the defendant, it appeared that there was no provision in the lease affecting responsibility for keeping in proper condition the place where the plaintiff was injured. The bill of exceptions quoted several requests by the plaintiff for instructions to be given to the jury, which were followed by the statement, "The court, in the matters touched by these requests, instructed the jury as follows: . . ." after which was set out in four pages of the printed record what appeared to be quotations from the charge to the jury covering every aspect of the defendant's legal duty and his alleged failure to perform that duty. The plaintiff's exceptions were saved in these words: "By the refusal of the court to give the instructions asked for, and by the aforesaid instructions given, the plaintiff has been aggrieved, and she hereby excepts to the refusal of the court to give said instructions and to said instructions given." At the argument of the exceptions in this court, the plaintiff waived exceptions to refusals to instruct the jury as requested and relied only on an alleged erroneous instruction contained in a single paragraph of the charge. It did not appear that the alleged error was called to the attention of the trial judge at the close of the charge. In considering the exception, it was *stated* that it was doubtful whether any exception was open to the plaintiff under the circumstances.

The portion of the charge which the plaintiff, under the circumstances above described, contended was erroneous, followed a paragraph in which the judge had pointed out that, in order for the defendant to be liable, the jury must find that the plaintiff had been invited upon the premises by the defendant, the judge repeating, with emphasis, that the invitation must be by the defendant. The alleged erroneous instruction was as follows: "Other people could invite this lady upon the premises if they had seen fit, — although the person that invited her was the person that undertook to see that it was safe. It may be that you think there is a difference between the doctor [the defendant] and the plaintiff in that matter. The United States government may have been the person that invited the plaintiff on these premises. If it was, then it was the United States government that undertook the duty of seeing that they were reasonably safe, no matter to whom they belonged, if it invited her to use them." Following this instruction, the judge reviewed the evidence bearing upon the question whether the defendant had invited the plaintiff to go upon the premises. *Held*, that the portion of the charge alleged to be erroneous was not open to objection, and that no substantial error in the charge resulting in a mistrial was shown.

TORT for personal injuries resulting from a fall upon ice alleged to have accumulated, through negligence of the defendant, in an open space upon land in Foxborough owned by the defendant adjacent to an approach to the post office, which under a lease occupied a part of a building of the defendant. Writ dated March 22, 1916.

In the Superior Court the action was tried before *Wait, J.* The material evidence is described in the opinion. The plaintiff made several requests for instructions to be given to the jury. Exceptions to a failure of the judge to instruct as requested were waived in open court at the argument of these exceptions.

That portion of the charge to the jury, in which was included the portion quoted in the opinion, was substantially as follows:

"Now one word on the question of invitation. It is one thing to invite people there, and another thing to permit them to be there. In the one case he owes a duty; in the other case, he does not. . . . So that what you have got to get at here is: Was the plaintiff invited by Dr. Sawyer upon the premises? And I emphasize the words, too, 'by Dr. Sawyer.'

"Other people could invite this lady upon the premises if they had seen fit, — although the person that invited her was the person that undertook to see that it was safe. It may be that you think there is a difference between the doctor and the plaintiff in that matter. The United States government may have been the person that invited the plaintiff on these premises. If it was, then it was the United States government that undertook the duty of seeing that they were reasonably safe, no matter to whom they belonged, if it invited her to use them.

"Did Dr. Sawyer? What is the evidence with regard to Dr. Sawyer inviting anybody to use the premises? There is not any dispute that he owned them. You have seen the premises, and have seen how they are laid out. There is not any dispute that he knew that everybody travelled across those premises in various ways, and at various times, whenever they chose, and with horses and carriages and automobiles, on foot and every other way; and, by notices he put up, he warned them they were not to use them claiming any right thereby to use them as against him, the owner of the property.

"With that knowledge, with the premises laid out as they were, are you satisfied, by a fair preponderance of the evidence, that there is some definite invitation addressed to this lady, and addressed to others to use those premises for the purpose of coming to the post office and for any other purpose? You have got to answer that from your common sense.

"There were definite concrete walks there. If they were there, did that imply in any way, one was invited to use them in preference to other ways? It might be, and it might not be. It is a question for you to say.

"If I invite people to go upon my land, I am not obliged to

fence off everything except a path up to my door. The law does not say the absence of a fence is an invitation. . . ."

There was a verdict for the defendant; and the plaintiff alleged exceptions.

J. F. Warren, for the plaintiff.

R. W. Hale, (*G. L. Wilson* with him,) for the defendant.

RUGG, C. J. This is an action of tort whereby the plaintiff seeks to recover damages for personal injuries received by her while walking from the door of the post office in Foxborough to the public street. She slipped on ice upon land of the defendant. The issues at the trial so far as now material were, whether the defendant owed to the plaintiff any duty, and whether he had done or omitted to do any act in violation of that duty. *Bernabeo v. Kaulback*, 226 Mass. 128, 131.

The defendant was the owner of the building, in which was the post office, and of the open space lying between its door and the street. A lease executed to the United States post office department by the defendant was in evidence. Its terms neither imposed upon him nor relieved him from obligation to care for the open space, and by them the post office department did not assume obligation to care for the open space or for any part of the building, but the defendant was obliged to keep the leased premises in repair. It does not appear whether the lease covered the open space where the plaintiff received her injury.

At the close of the evidence the plaintiff presented several requests for rulings, which were denied. They covered in general the duty owed by the defendant to the plaintiff and his breach of that duty. It is said in the exceptions, "The court in the matters touched by these requests instructed the jury as follows: . . ." Four printed pages follow, wherein is apparently covered every aspect of the defendant's legal duty and his failure to perform that duty. The saving of exceptions is in these words: "By the refusal of the court to give the instructions asked for, and by the aforesaid instructions given, the plaintiff has been aggrieved, and she hereby excepts to the refusal of the court to give said instructions and to said instructions given." At the argument at the bar of this court, exceptions to the refusals to grant the requests were expressly waived. The only point relied upon or argued is that there was error in this single statement in the charge:

"Other people could invite this lady upon the premises if they had seen fit, — although the person that invited her was the person that undertook to see that it was safe. It may be that you think there is a difference between the doctor [the defendant] and the plaintiff in that matter. The United States government may have been the person that invited the plaintiff on these premises. If it was, then it was the United States government that undertook the duty of seeing that they were reasonably safe, no matter to whom they belonged, if it invited her to use them."

It is doubtful if any exception is now open to the plaintiff under these circumstances. The attention of the judge was not called to this or to any other particular part of the charge at its conclusion as being erroneous. Such an exception after waiver of specific requests is scarcely more than a general exception to a charge. In fairness to the judge, objection to specific portions of the charge should have been brought to his notice and the error upon which reliance was placed pointed out to him. *Curry v. Porter*, 125 Mass. 94. *Barker v. Loring*, 177 Mass. 389, 391. *Hunting v. Downer*, 151 Mass. 275. *Commonwealth v. Jewelle*, 199 Mass. 558. In any event, such an exception ought not to be sustained unless there was a substantial error in the charge which misled the jury. *Rock v. Indian Orchard Mills*, 142 Mass. 522, 529. *Brick v. Bosworth*, 162 Mass. 334, 336.

No substantial error resulting in a mistrial is disclosed in the charge. The paragraph which, it is now urged, was harmful, was not open to objection. The action was not against the tenant but against the landlord. No express agreement between the landlord and tenant in respect of the use or repair of the open space in front of the post office door appears in the record. It was pertinent for the jury to consider all the circumstances in arriving at a conclusion upon the vital issue whether the defendant owed the plaintiff any duty. One circumstance was the fact that a room in the building opening directly out of doors was under lease to a tenant who might be thought to invite the public to its entrance. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 372. *Mackey v. Lonergan*, 221 Mass. 296. *Scanlon v. United Cigar Stores Co.* 228 Mass. 481. *Pizzano v. Shuman*, 229 Mass. 240.

Exceptions overruled.

FRANK KAMINSKI, administrator, vs. ETIENNE FOURNIER.

Worcester. January 12, 1920. — February 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Causing death, In use of motor vehicle, In use of highway, Contributory. Practice, Civil, Exceptions.

At the trial of an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate, there was evidence tending to show that, previous to the accident, the defendant was "coasting" his motor vehicle down a hill about three hundred feet long, and had just passed a street car, which was at the extreme right of the road and was going up the hill; that between the street car tracks and the left hand side of the road there was ample space for vehicles to meet and pass each other; that the plaintiff's intestate was an elderly woman; that, previous to the accident, she had stepped from the sidewalk into the street and had looked both ways but had seen no vehicle approaching; that the place where she stood was about thirty feet from the foot of the hill, and that from there the view was unobstructed up the hill and for a short distance beyond its top; that, after looking both ways, the plaintiff's intestate dropped her house key, stooped to pick it up and was struck by the defendant's vehicle which then was running at the rate of about twenty miles an hour; that the defendant was not a skilful driver and had with him a professional chauffeur, who, seeing the plaintiff's intestate, directed the defendant to "put on the brakes hard," but that the defendant took off the brake. *Held*, that there was evidence warranting a finding that the defendant was negligent and that the plaintiff's intestate was actively looking out for her own safety.

In the action above described the jury found for the plaintiff and, when the verdict was recorded and before the jury were dismissed, the judge under St. 1915, c. 185, reserved leave with the jury's assent to enter a verdict for the defendant if it later should be decided by the Superior Court or by this court that a verdict for the plaintiff ought not to have been entered. Later the judge, subject to an exception by the plaintiff, allowed a motion that a verdict be entered for the defendant. This court, having determined that the allowance of that motion was error, also *held*, that a contention of the plaintiff that a new trial must be granted could not be supported and, under St. 1913, c. 716, § 2, *ordered* that the original verdict for the plaintiff should stand.

TORT by the administrator of the estate of Mary Trzybinska, the declaration alleging that the defendant negligently ran into the plaintiff's intestate and caused her death. Writ dated August 31, 1917.

In the Superior Court the action was tried before *Hammond, J.*

Material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict for him be ordered. The motion was denied. There was a verdict for the plaintiff in the sum of \$500.

The bill of exceptions recites: "Before the jury was dismissed, and when the verdict was affirmed and recorded, the judge reserved leave with the consent of the jury under the provisions of St. 1915, c. 185, to enter a verdict for the defendant in case it should be decided either by this court or by the Supreme Judicial Court that such a verdict ought to have been so entered. The defendant then filed a motion that a verdict and judgment for the defendant be entered in accordance with the reservation of the court at the trial. This motion was later argued by counsel for both parties. The court allowed the defendant's motion to enter a verdict for the defendant in accordance with the reservation at the trial, but denied the defendant's motion that judgment be entered." The plaintiff alleged exceptions.

St. 1915, c. 185, is as follows:

"Section 1. Chapter one hundred and seventy-three of the Revised Laws is hereby amended by striking out section one hundred and twenty and inserting in place thereof the following: Section 120. When exceptions to any ruling or direction of a judge shall be alleged, or any question of law shall be reserved, in the course of a trial by jury, and the circumstances shall be such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise than as was done at the trial, the judge may reserve leave, with the assent of the jury, so to enter the verdict or finding, if upon the question or questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact that may have been submitted to them, shall be entered in the record of the proceedings, and if upon the question or questions of law it shall be decided, either by the same court or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly and, when so entered, it shall have the same effect as if it had been entered at the trial.

"Section 2. Nothing herein contained shall be so construed as to limit the powers of the court conferred by chapter two hundred and thirty-six of the acts of the year nineteen hundred and nine or by chapter seven hundred and sixteen of the acts of the year nineteen hundred and thirteen."

A material portion of St. 1913, c. 716, § 2, is as follows: "Whenever a question in dispute at the trial of an issue of fact in any civil action or proceeding depends upon the decision of a question of law, the full bench of the Supreme Judicial Court, upon appeal, exceptions or report or otherwise, may, if satisfied that it has before it all the facts necessary for determining the question in dispute, direct that such judgment or decree be entered or that such other action be taken as shall accord with the determination of the full court."

The case was submitted on briefs.

E. H. Vaughan & A. R. Greeley, for the plaintiff.

E. I. Taylor, for the defendant.

RUGG, C. J. This is an action of tort to recover damages for the death of Mary Trzybinska. The evidence in its aspect most favorable to the plaintiff would have warranted a finding of these facts: A little after seven o'clock on a late July evening, on one of the principal streets in the town of Webster, the deceased, an elderly pedestrian, received mortal injuries by being struck by an automobile driven by the defendant. The street leads generally in an east and west direction. On its south side was the track of a street railway, between which and the north gutter of the street there was ample space for teams and vehicles to meet and pass each other. The accident occurred about thirty feet easterly from the foot of a hill, straight up which westerly the street went about three hundred feet to its top and thence onward. From the place of the accident an automobile might be seen a short distance beyond the top of the hill. An electric car going up the hill passed shortly before the accident, which occurred thirty or forty feet from the electric car. No vehicles other than the electric car and the automobile, and no persons aside from the deceased and those in the car and in the automobile, were in the neighborhood. The deceased came from the north side of the street, being opposite to that on which was the street railway track. Before stepping off the sidewalk preparatory to crossing

the street, she looked both ways to see if any machine was coming and did not observe any. Then, as "she put her foot on the street from the sidewalk," she dropped her house key and stooped to pick it up and was struck by the automobile moving at the rate of twenty miles an hour. There was evidence to the effect that the deceased took "two steps from the curb" and that she was not "more than a foot or two from the sidewalk." The defendant was not a skilful driver. A professional chauffeur was with him, who testified that they were coasting down the hill, that he saw the deceased upon the sidewalk and noticed her step from the sidewalk into the street, and that he told the defendant to "put on the brakes hard," but instead, the defendant took off the brake.

Plainly, there was evidence of negligence on the part of the defendant.

There was direct and inferential evidence sufficient to support a finding that the deceased was actively in the exercise of due care. *Hudson v. Lynn & Boston Railroad*, 185 Mass. 510. *Hayes v. Boston Elevated Railway*, 224 Mass. 303. Evidence to the effect that the deceased looked both ways before stepping off the sidewalk and did not see the automobile is not so clearly contradicted by the irrefutable facts as to require the conclusion that she looked negligently within the rule declared in *Roberts v. New York, New Haven, & Hartford Railroad*, 175 Mass. 296, *Fitzgerald v. Boston Elevated Railway*, 194 Mass. 242, and *Pigeon v. Massachusetts Northeastern Street Railway*, 230 Mass. 392, 396. The case at bar does not fall within that class. If the automobile was being driven at the rate of twenty miles an hour, it would traverse the distance between the place of the accident and the point where it first was within the possible field of vision of the deceased, when according to evidence she looked both ways and saw no vehicle, within a period of fifteen seconds or perhaps less. It hardly can be said that it was impossible according to known facts for the deceased, who was an elderly woman, to have looked up the hill and failed to see the automobile for the reason that it was not then in sight, and yet that it might have struck her as she was stooping over to pick up the key within two feet of the sidewalk. Active attention to her own safety did not require her to anticipate and guard against the danger that an automobile, driven at

such speed as to reach a point in the highway opposite her within fifteen seconds, would run her down rather than avoid collision with her by using other parts of the broad highway. This is especially true in view of St. 1917, c. 200, which requires every person operating a motor vehicle, upon approaching a pedestrian upon the travelled part of a way and not upon a sidewalk, to "slow down and give a timely signal with his bell, horn or other device for signalling." The inference might rationally have been drawn that the deceased was actively looking out for her own safety. *Buoniconti v. Lee*, 234 Mass. 73. *Sarmiento v. Vance*, 231 Mass. 310. *Booth v. Meagher*, 224 Mass. 472. *Creedon v. Galvin*, 226 Mass. 140.

It is stated in the exceptions that leave was reserved under St. 1915, c. 185, to enter a verdict for the defendant in case it should be decided either by the Superior Court or by the Supreme Judicial Court that such a verdict ought to have been entered. Thereafter the judge, before whom the case was tried, allowed a motion of the defendant to enter verdict in accordance with the reservation. The allowance of that motion was error. The order allowing that motion is set aside and the original verdict of the jury is to stand. The contention of the plaintiff that a new trial be granted cannot be supported. Whether there would be otherwise necessity for a new trial under these circumstances need not be decided, because it is avoided by St. 1913, c. 716, § 2. The powers conferred by that statute expressly are preserved by St. 1915, c. 185, § 2. See *Bergeron v. Forest*, 233 Mass. 392, 402, 403; *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 475, 476.

Exceptions sustained.

Verdict of jury to stand.

Judgment for plaintiff on the verdict.

MARIA S. LARSEN vs. JOSEPHINE C. DILLENSCHNEIDER.

Middlesex. January 12, 1920. — February 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Land Court, Appeal. Tax, Validity of tax sale.

Upon an appeal from a decree of the Land Court, entered upon findings in a master's report to which there were no objections or exceptions, the only question open is, whether the decree is warranted by the pleadings and the facts found by the master.

A description of land in a certain city in an assessment of it for taxes, in an advertisement of it for sale for unpaid taxes and in a deed of it to the purchaser at the sale is sufficiently definite and accurate if it is by reference to a lot by number on a certain plan recorded in the office of the assessors of taxes but not in the registry of deeds.

PETITION, filed in the Land Court on January 2, 1919, for the registration of the title to certain land on Clifton Street in Cambridge.

In the Land Court the case was referred to a master. In his report he stated: "The only doubtful thing about the validity of these [tax] titles [of 1908 and 1909] . . . is the descriptions in the . . . deeds." There were no objections or exceptions to his report. The report was confirmed and a decree registering the title in the petitioner was entered by order of *Davis, J.* The respondent appealed.

J. C. Dillenschneider, pro se.

P. J. Nelligan, for the petitioner, submitted the case without argument or brief.

RUGG, C. J. This is an appeal from a decision of the Land Court. The proceeding is for the registration of the title to a parcel of land in Cambridge. There was reference to a master. No evidence is reported and no exceptions were taken to the master's report. The hearing before the judge of the Land Court was on the master's report. The facts found by the master must be accepted as true. The only question open is whether a decree for the plaintiff is warranted by the pleadings and master's report. *Lyons v. Elston*, 211 Mass. 478, 482. *Harrigan v. Dodge*, 216 Mass. 461. *Schneider v. Hayward*, 231 Mass. 352. Other questions, argued

orally and upon the brief of the respondent, cannot be considered because they are not before us.

It appears from the record that the locus in question was devised to the respondent in 1895. Between 1900 and 1905 it was sold five times for taxes. In 1905 it was sold at execution sale. The petitioner claims under tax sales for the years 1908 and 1909. The only question of law presented relates to the description in the assessment, advertisement and deeds for these two years. That description was in these words and figures: "South side of Harvey Street, a parcel of land with the buildings thereon being lot No. 7 on Block Plan No. 269 dated April, 1897, in the office of the assessors of the City of Cambridge, and containing 4810 square feet." No metes and bounds were given and there was no reference to any other plan. The plan designated was not on record in the registry of deeds.

"Now it is a well settled rule of construction, that where a plan is referred to in a deed, as containing a description of an estate, the courses, distances and other particulars, appearing upon the plan, are to be as much regarded, in ascertaining the true description of the estate, and the intent of the parties in making it, as if they had been expressly recited and enumerated in the deed." *Morgan v. Moore*, 3 Gray, 319, 321, 322. *Fox v. Union Sugar Refinery*, 109 Mass. 292, 296. Manifestly a reference in a deed, assessment or advertisement to a lot by number on a plan recorded in the registry of deeds would be a sufficient description. It has been held that reference to instruments or plans not then but later recorded were sufficient for descriptive purposes in a deed. *Robinson v. Brennan*, 115 Mass. 582. *Blaney v. Rice*, 20 Pick. 62. References in deeds to plans apparently never made matter of record have been held incorporated into the deeds and binding upon the parties. *Lunt v. Holland*, 14 Mass. 149. *Magoun v. Lapham*, 21 Pick. 135.

An assessor's plan, which shows the particular lot in connection with all neighboring lands, affords a definite and accurate description. It is easily found. It is open to public inspection at reasonable times under rational limitations. R. L. c. 35, § 17. As a practical matter it affords quite as certain and accessible information to anybody in interest as does a plan in the registry of deeds. Reference to such a plan reaches the main end sought by

advertisement in tax sales, which is to enable the owner and prospective bidders to locate the land to be sold with substantial certainty. *Connors v. Lowell*, 209 Mass. 111, 120. *Williams v. Bowers*, 197 Mass. 565. *Bemis v. Caldwell*, 143 Mass. 299.

Decision affirmed.

JACKSON CALDWELL COMPANY *vs.* LUIGI POTO.

Suffolk. January 12, 13, 1920. — February 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Municipal Court of the City of Boston, Report to Appellate Division. *Contract*, What constitutes, Implied. *Evidence*, Presumptions and burden of proof.

No appeal lies from a denial by the Appellate Division of the Municipal Court of the City of Boston of a petition to establish the truth of a report, which, upon its presentation for allowance to the trial judge of the court, had been disallowed by him.

In an action upon an account annexed for a balance alleged to be due for furniture sold to the defendant and delivered to his daughter, the burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence that the goods were sold to the defendant.

The circumstances, in the action above described, that the father made payments of considerable amounts upon the purchase price of a number of items of furniture for the home of his married daughter and that a few chairs included in the items in the account annexed to the declaration were delivered at his place of business, although important as evidence were *held* not as a matter of law to be decisive in fixing liability upon the father.

At the trial of the action above described, the judge excluded evidence tending to show that the defendant suggested to the plaintiff that efforts be made to collect the bill for the furniture from the daughter's husband. *Held*, that the exclusion was proper.

CONTRACT upon an account annexed for furniture. Writ in the Municipal Court of the City of Boston dated October 24, 1917.

The material evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence, the plaintiff asked for the following rulings:

"1. Upon all the evidence the plaintiff is entitled to recover the full amount.

"2. The burden of proof is upon the defendant to show payment.

"3. The burden of proof is upon the defendant to show that he did not receive the goods, that he did not contract for the said goods, and that he did not hold himself out to the plaintiff as the party responsible and liable for the value of said goods.

"4. Upon all the evidence, the burden is upon the defendant to prove that he did not agree to pay for said goods, and that he did not hold himself out as the party liable for said goods."

The judge gave the second ruling and refused the others, and found for the defendant.

The plaintiff presented a draft of a report to be made by the judge to the Appellate Division, which the judge disallowed as not conformable to the truth. The plaintiff thereupon filed with the Appellate Division a petition to establish the report prepared by him. The petition was denied and the plaintiff filed a claim of appeal therefrom.

The judge filed with the Appellate Division a report prepared by himself. The Appellate Division dismissed the report; and the plaintiff appealed.

J. A. Vitelli, for the plaintiff.

G. H. Shields, for the defendant, was present in court, but submitted no argument or brief.

RUGG, C. J. This case comes before us on appeal from the Municipal Court of the City of Boston. The plaintiff filed a draft report alleged by it to be conformable to the truth, which was disallowed by the judge who tried the case. Its petition to establish the draft report was denied by the Appellate Division. That decision is final. *Cohen v. Berkowitz*, 215 Mass. 68. The case must be considered on the footing of the report prepared and allowed by the judge. The draft prepared by the plaintiff must be disregarded. Speaking accurately, it is no part of the record.

The action is in contract to recover a balance due on an account annexed for furniture delivered to a married daughter of the defendant. In the report is the statement that "There was no evidence that the defendant purchased the goods declared on, or directed them to be charged to him, other than the fact that the charge appeared on the plaintiff's books showing that they were charged to the defendant in the usual course of business. The conversation that occurred at the time of the purchase was not remembered by any witness so as to be of any value. The de-

fendant denied that he purchased the goods or directed them to be charged to him." He was with his daughter when the goods were purchased and made payments on the account from time to time.

The burden of proof was upon the plaintiff to prove by a fair preponderance of the credible evidence that the goods were sold to the defendant. It is enough to dispose of the case to say that that was wholly a question of fact. The judge might have disbelieved every part of the plaintiff's evidence inconsistent with the denial of the defendant. *Lindenbaum v. New York, New Haven, & Hartford Railroad*, 197 Mass. 314. *Commonwealth v. Russ*, 232 Mass. 58. The circumstances that a father makes payments of considerable amounts upon furniture for the home of his married daughter, or that a few of the chairs were delivered at the defendant's place of business, although important as evidence, are not decisive in fixing legal liability in contract upon him. It is rarely that it can be ruled as matter of law that the burden of proof resting upon a party has been sustained. *McDonough v. Metropolitan Life Ins. Co.* 228 Mass. 450, 453. This case does not belong to that class.

No error of law is disclosed in the findings made, and they are not inconsistent with each other or with admitted facts.

Whether the defendant ever suggested to the plaintiff or its agent that efforts be made to collect the bill of his son-in-law was irrelevant to the issue whether the defendant made the contract in suit. Questions upon that point were excluded properly.

The several requests which were denied were dealt with rightly.

Order dismissing report affirmed.

ANNA B. EARLE, administratrix, vs. NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY.

Norfolk. January 20, 1920. — February 25, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Witness, Expert. Evidence, Opinion: expert. Practice, Civil, Discretionary power of trial judge as to expert testimony, Exceptions.

It is within the discretionary power of a trial judge to exclude a hypothetical question asked of an expert witness if in the question facts are assumed which are not yet in evidence.

An expert medical witness called by the plaintiff at the trial of an action of tort was asked in cross-examination a hypothetical question, based upon an assumption of facts of which no evidence yet had been introduced. The question was excluded and the defendant excepted. In redirect and in recross-examination there was extensive inquiry on the same subject matter and the defendant was permitted to ask questions which in substance sought the same information as that which previously had been excluded in cross-examination. *Held*, that the exceptions must be overruled, both because it was a proper exercise of discretion to exclude hypothetical questions based on facts of which there was not as yet any evidence, and because, owing to the redirect and recross-examination, the defendant was not harmed by the exclusion.

TORT by Benjamin M. Earle for personal injuries, received on July 6, 1909, while a passenger upon a railroad train of the defendant and alleged to have been caused by negligence of the defendant. Writ dated February 2, 1910.

In February, 1915, the plaintiff died and his widow, Anna B. Earle, was appointed administratrix and was admitted as plaintiff to prosecute this action.

The action was tried before *McLaughlin, J.* There was evidence of negligence of the defendant.

Edward T. Taylor, a medical expert called by the plaintiff, testified that in his opinion the plaintiff's intestate had suffered from "hysterical blindness," of which the accident described in the plaintiff's evidence was an adequate cause; and that the eyes of a patient suffering from hysterical blindness might see objects to which they were directed, although, through a failure of some part of the brain to register that fact, the patient would not believe that he was seeing the object.

In cross-examination Dr. Taylor testified that he had examined the plaintiff's intestate three times. His report of the second examination, held on March 15, 1910, contained the following: "He has been South several times and has done a good deal of hunting and killed a number of birds. He says he shot by sound. 'I couldn't see a bird to save my life,' but admits that on one occasion he saw the 'flash' of a falling goose, although he was unable to see the geese in general." The witness was asked, "At that time it was not possible for you to believe, Doctor, that he didn't see more than he admitted, was it — in regard to this shooting episode?" and answered, "I felt that he did see at times — I want to be just in the situation — at times it seemed to me that he probably saw somewhat more than he admitted." He then was asked, "Well, do you remember whether you accepted his statement that he could shoot geese by sound?" and answered, "Well, I had it down there as you see, in his own language, and in my own opinion, as I say, I am not a hunter, — but I should think he must have been a pretty good shot to do it." There then followed the questions, quoted in the opinion, which were excluded.

In redirect-examination, the witness was asked, "Now your attention has been directed to your reports, and to exaggeration. Isn't that something that you frequently find in hysterical patients, a tendency to exaggerate?" and answered, "Yes, I think that is very characteristic of the hysterical type of person — a tendency to make a good deal of small things;" and further testified that at times a patient subject to hysterical blindness would have days when they could see normally and then from one cause or another at a succeeding time they would find themselves in a condition where they could not see. He also was asked, "Would the fact of seeing a man on one or two occasions shoot at birds and kill them affect your judgment that the man had hysterical blindness?" and answered, "It would not. It would simply indicate that at that time he was not hysterically blind — at the time of that particular shooting."

In recross-examination occurred the following questions and answers: "Q. Now I understand from what . . . [the plaintiff's counsel] said that if a man jumped a ditch, climbed a fence, shot birds, that would not be inconsistent with the desire on his part to get well, and you assented that it would not be inconsistent,

didn't you? A. Why, I think so, if I understand you and . . . [the plaintiff's counsel]. I think I did understand. I think that is a perfectly natural thing for a man to do if he could. — Q. Would that be consistent with blindness? With hysterical blindness? A. Not while he was doing it, surely not. — Q. No. Exactly. Is it your notion, Dr. Taylor, that Mr. Earle could sight and see to shoot a duck one minute, in that early visit south in October of 1909, and a second afterwards he could be hysterically blind? A. That is a possibility. — Q. Is it your belief that that was the thing in this case? . . . A. I can't say as to any individual incident in the case, but the characteristic is a sudden loss and restoration of blindness. There is no question about that at all. It is a characteristic feature of this type of nervous disturbance." There then followed, in further recross-examination which filled three pages of the printed record, questions and answers on the same general subject.

The bill of exceptions states, "Dr. Taylor's testimony was introduced before the defendant offered any evidence. The defendant introduced competent medical testimony tending to show that Earle was not suffering from hysterical blindness and that his claims were not genuine. Testimony was admitted from various witnesses from South Carolina, called by the defendant, that Earle while in South Carolina in 1909 and 1910 frequently shaved himself when no one was present; that he frequently read newspapers and wrote letters; shot quail and duck many times; that he jumped across drains while walking; that he made his way alone through the forests; that on occasions, when strangers were present or approached, he would act in a way that indicated he was blind or could not see; that while in the South in 1909 and 1910 he told various people that he could not see; that he made his way over railroad tracks and to the railroad station in the dark; that he jumped from a boat to land; that he waded in streams, poling logs; that during the same period he drove a horse on an uneven road and that he harnessed the horse alone; that during the same period when no one was in the room with him he sat before a mirror and adjusted his wig on numerous occasions; that when he shot at duck and quail he took aim and the result of his shooting was that the birds fell to the ground and that he picked them up."

There was a verdict for the plaintiff in the sum of \$8,000; and the defendant alleged exceptions.

J. L. Hall, for the defendant.

J. W. McAnarney, (*R. H. Oveson* with him,) for the plaintiff.

CARROLL, J. The intestate, Benjamin M. Earle, was injured while a passenger on one of the defendant's trains in the South Terminal Station, Boston. There was evidence of the defendant's negligence and a verdict was returned for the plaintiff. The exceptions relate to the exclusion of certain questions put to the plaintiff's medical expert by the defendant, — it being the contention of the plaintiff that her intestate suffered from a disease known as hysterical blindness, caused by the injuries received; and of the defendant, that he did not suffer from blindness and that his claims were not genuine.

Dr. Edward T. Taylor, in direct examination, testified that he examined the intestate on several occasions, and that the accident was, in his opinion, sufficient cause for the visual disturbance complained of. On cross-examination he was asked: "Supposing, Doctor, he had gone down to some place in North Carolina, and told them he could not see; that he was blind, and that as a matter of fact they saw that he was shaving himself when no one was — when he thought no one was around, or reading, his newspaper, writing letters, or shooting birds, or jumping across drains, making his way through forests, — wouldn't the hysterical element in that — wouldn't your belief in the hysterical element in his case be somewhat shaken?" This question was excluded, and the defendant excepted. He was then asked, "Assuming, Doctor, that you knew that he had deliberately misrepresented his condition of blindness, or failure to see, with a purpose, would that affect your opinion in the case as to the existence of hysteria?" This also was excluded, subject to the defendant's exception. The witness was then further cross-examined: "Well, Doctor, if you knew, as a matter of fact, that the man at that time was able to take aim at ducks or quail, and bring them down, after shooting them, would not that affect your belief in the existence of hysteria?" To the exclusion of this question the defendant also excepted.

On redirect-examination Dr. Taylor testified that with hysterical patients there is an inclination to exaggerate and a patient

suffering from this disease could at times see as a normal person could. On recross-examination the doctor's attention was directed to the various acts testified to by the witnesses, and when asked if these things would be consistent with hysterical blindness, answered that they would not while he was performing these acts; and that it was possible the intestate "doesn't see a duck, and then in a second does see a duck," and that a sudden loss or restriction of sight was a characteristic feature of this disease. On recross-examination he was further asked: "Supposing those are the facts in the case, . . . do you also subscribe yourself as believing that he [Earle] had hysterical blindness at that time?" And his answer was in the affirmative.

When the testimony was excluded upon cross-examination, the hypothetical question assumed facts which were not then in evidence; and the discretion of the judge in refusing to allow the questions at that time is not subject to exception, unless it appears that the discretion was wrongly exercised. *Anderson v. Albert-stamm*, 176 Mass. 87. *Carroll v. Boston Elevated Railway*, 200 Mass. 527. The defendant was given an opportunity upon recross-examination to inquire fully concerning the nature and extent of the intestate's claim. It was not prevented from making any material inquiry, and even if there were error in excluding the questions, this error was cured by their subsequent admission. *Chalmers v. Whitmore Manuf. Co.* 164 Mass. 532. *Providence & Worcester Railroad v. Worcester*, 155 Mass. 35.

The defendant's contention is that it was not permitted to ask whether or not in the opinion of the witness Earle was hysterically blind. In recross-examination the defendant was given the opportunity fully to examine him, and in fact availed itself of this opportunity. It was allowed to present completely its case and to examine fully the medical expert, and was not deprived of any of its rights in the conduct of the trial.

Exceptions overruled.

HENRY ROOSEN, administrator, *vs.* PETER BENT BRIGHAM
HOSPITAL.

SAME *vs.* SAME.

Suffolk. November 20, 1919. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Charity. Corporation, Charitable. Negligence, Of officers and employees of public charitable corporation. Contract, Performance and breach.

A public charitable corporation operating a hospital is not liable in an action of tort for the conscious suffering of one of its patients caused by negligence, either of its managing officers in selecting incompetent servants and employees or of servants or employees selected with care.

An action of contract against a public charitable corporation conducting a hospital cannot be maintained by the administrator of the estate of a patient, who suffered consciously and afterwards died in the hospital, upon allegations that the defendant made an oral contract to give to the plaintiff's intestate careful and proper care and treatment and that the intestate's suffering was caused by a breach of the contract and the rendering of "careless and improper care and treatment."

The provisions of R. L. c. 171, § 2, as amended by St. 1907, c. 375, impose no liability upon a public charitable corporation conducting a hospital for the causing of the death of a patient which resulted either through the negligence of the officers of the defendant in selecting incompetent servants or employees or through negligence of servants or employees carefully selected.

TORT, with a declaration in two counts, by the administrator of the estate of Jennie Roosen for causing her death, it being alleged in the first count that the death was caused by the acts, described in the opinion, of incompetent persons negligently employed by the defendant, and the second count containing allegations that the death was caused by "the combined negligence of certain persons in" the defendant's "pharmacy department" and of the nurse attending the plaintiff's intestate. Writ dated March 21, 1919; also an action of

TORT OR CONTRACT, with a declaration as amended in five counts, by the same plaintiff for the conscious suffering of the plaintiff's intestate, preceding her death, the allegations in the counts as to the cause of the conscious suffering being as follows: in the first count, a failure of the defendant to fulfil contract obligations

undertaken by it to give to the plaintiff's intestate careful and proper care and treatment; in the second, fourth and fifth counts, negligence of the defendant and of its governing board and officers in employing incompetent persons, whose incompetence and negligence caused the suffering of the plaintiff's intestate; in the third count, negligence of the nurse who was in attendance upon the plaintiff's intestate.

The defendant demurred to the declaration in each case. The demurrers were heard by *Wait, J.*, and were sustained. Judgments for the defendant were entered; and the plaintiff appealed.

W. G. Thompson, (R. Spring with him,) for the plaintiff.

R. G. Dodge, (C. F. Choate, 3d, with him,) for the defendant.

RUGG, C. J. These are two actions, one to recover for the death and the other for the conscious suffering of Jennie Roosen, the plaintiff's intestate, caused by injuries sustained by her while she was a patient in the hospital conducted by the defendant. The specific act alleged as that out of which the actions arise was careless and negligent treatment of the patient, while at the hospital for a surgical operation and the subsequent convalescence, in that corrosive sublimate, a deadly poison, was administered to her in place of Epsom salts, a harmless drug. Distinctive allegations of several counts charge corporate negligence of the defendant in employing incompetent servants, whose conduct caused the harm, and in causing the receptacles containing corrosive sublimate and Epsom salts, drugs which closely resemble each other in appearance, to be and remain in near proximity to each other. Another count alleges the combined negligence of those in charge of the drugs and of the nurse in administering the poison. Another count avers an oral contract with the defendant whereby it promised, in consideration of weekly payments to it in advance, to perform an operation and to provide, for the use of the plaintiff's intestate, a bed and board and to give her "careful and proper care and treatment," and breach of that contract by giving her "careless and improper care and treatment."

That the defendant is a public charitable corporation established for the care of sick and indigent persons is not controverted. The fact that it receives compensation from some of its patients does not affect in any respect its character or liability as a public charity. *New England Sanitarium v. Stoneham*, 205 Mass. 335, and

cases cited at page 342. All such payments are devoted exclusively to charitable uses and not at all for private gain.

It was decided in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, that there could be no recovery in an action of tort for injuries received through negligence of the servants or agents of a public charity such as is a hospital. The principle of immunity there stated was that a charitable corporation of that nature "has no funds which can be charged with any judgment which he [the plaintiff] might recover, except those which are held subject to the trust of maintaining the hospital." That decision was affirmed in *Benton v. Boston City Hospital*, 140 Mass. 13, 17, which, however, went on the ground that the defendant, although a corporation, was in truth but an agency of the city of Boston and that, as a municipality, it could not be held liable for negligence of its servants in the performance of a function undertaken by it as a department of government, on the authority of *Hill v. Boston*, 122 Mass. 344. In *Farrigan v. Pevear*, 193 Mass. 147, an action of tort for negligence of servants of a private charity, it was said, after relying upon *McDonald v. Massachusetts General Hospital*, *ubi supra*, as an authority exonerating the defendant, "Among the reasons given for this exemption it has been said, that being a charitable institution rendering services to the public without pecuniary profit, if the property of the charity was depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged: or that if an individual accepts the benefit of a public charity he thereby enters into a relation which exempts his benefactor from liability for the negligence of servants who are employed in its administration, provided due care has been used in their selection." In holding in *Zoulalian v. New England Sanatorium & Benevolent Association*, 230 Mass. 102, that the workmen's compensation act, St. 1911, c. 751, Part I, does not apply to a public charitable corporation, it was said, pages 105, 106: "It never has been held in this Commonwealth that a charitable institution was liable for negligence; on the other hand, it has been expressly held that such institutions are not liable for the negligence of their servants or agents." To the same general point is *Thornton v. Franklin Square House*, 200 Mass. 465. In *Conklin v. John Howard Industrial Home*, 224 Mass. 222, the plaintiff

sought to recover for personal injuries received by him, while in the employ of the defendant, by reason of the defective condition of a wood chopping machine with which he was set at work without adequate instruction or warning. That was an allegation of corporate negligence as distinguished from negligence of servants or agents. It is a duty of an employer, which is personal and cannot be delegated, both to furnish safe appliances to his servant and to warn inexperienced employees of dangers known to the employer and not obvious and not known to the servant. *Moynihan v. Hills Co.* 146 Mass. 586. *Erickson v. American Steel & Wire Co.* 193 Mass. 119, 125. *Ryan v. Fall River Iron Works Co.* 200 Mass. 188, 192. *Wheeler v. Wason Manuf. Co.* 135 Mass. 294, 298.

The specific ground on which the immunity of hospitals for negligence of servants rests has been discussed only in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, among our adjudications. That decision was put squarely on the foundation that the funds of a public hospital are devoted to a charitable trust and that to subject them to the payment of a judgment for negligence of its servants would be an unlawful diversion of the trust. That is the ground upon which that decision rests. No other is suggested in the opinion. In *Farrigan v. Pevear*, 193 Mass. 147, several grounds were referred to, but the chief point settled in that case was that a private charity stood in respect of liability for negligence of its servants on the same footing as a public charity and so far as concerns binding authority it rested upon *McDonald v. Massachusetts General Hospital*, 120 Mass. 432.

The case at bar presents, as one of its main questions, whether a hospital can be held liable for the negligence of its managing officers in selecting incompetent servants and agents. In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, occurs this cautious statement: "The liability of the defendant corporation can extend no further than this: if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible." In substance this has been repeated in several subsequent decisions and in numerous adjudications by other courts where that decision has been cited. That sentence now is seized upon as basis for the

argument that such a charitable corporation as a hospital should be held liable in damages for negligence of its managing officers in selecting incompetent subordinate agents. That sentence, however, was merely precautionary. It bounded the question presented by the facts then before the court. It simply showed the extent of the decision. It does not purport to be a comprehensive or exclusive statement. The correlative assertion, to the effect that there is liability of the hospital in cases where there has been carelessness on the part of the managers in the selection of servants and agents, is neither expressed nor implied. The discussion of the question now presented must be approached in the light of *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, as a binding authority.

There is no sound distinction in reason between the liability of a hospital for the negligence of its inferior agents and its liability for the carelessness of its managers. The conduct of both relates to the execution of the charity. The inferior agents usually work for pay, while the managing officers as matter of common knowledge generally undertake the administration of the public charity without compensation, solely out of public spirit in a desire to serve the general welfare. If the hospital is held responsible for their acts of negligence, the funds devoted to the relief of suffering humanity must be diverted in the one instance to the same extent and manner as in the other to the payment of claims wholly foreign to the purposes of the public trust. That being the ground of decision in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, it is as applicable to the facts here alleged as to those there presented.

The doctrine of liability of an employer for negligence in the selection of servants is a doctrine of the law of master and servant. The master owes the general duty to his servants not to expose them to any perils not necessarily incident to his business, against which reasonable care on his part may guard them. The selection of servants is a function of the master. It is a part of his general obligation to employ servants with whom others may safely work so far as that end may be attained through the exercise of ordinary diligence. It ameliorates the common law doctrine of non-liability of the master to one servant for the negligent act of his fellow servant. It was established because the employment of servants

was the personal act of the master, which could not be delegated and for which therefore he was personally liable. It is as much one of the implied terms of the contract of employment that the master will use due care in the selection of fellow servants as that he will provide a safe place to work, or furnish and maintain machinery in good repair. The employee has a right to rely upon the performance of that duty by his employer and can recover damages flowing from failure in that particular. It is of no consequence to anybody except a fellow servant, whether an injury is inflicted through the negligence of a servant selected with the greatest care or one selected without any care at all. In either case the person injured by such negligence makes out the liability of the master (if such liability exists) through proof of injury to him caused by the negligence of the servant in the course of his employment. See *Gilman v. Eastern Railroad*, 10 Allen, 233, 238; *S. C.* 13 Allen, 433, 441; *Cayzer v. Taylor*, 10 Gray, 274; *Dennis v. Clyde*, *New England & Southern Lines*, 229 Mass. 502, 504; *Wabash Railway v. McDaniels*, 107 U. S. 454.

So far as concerns third persons (except where there is some special statutory provision, see *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, for review of statutes), there is no distinction between the liability of an employer for the negligence of his servants in the course of their employment and for his own negligence in selecting incompetent servants. The measure of responsibility in one case is the same as in the other.

The duty of selecting competent servants is no more clearly a duty personal to the master not susceptible of delegation than is the duty to provide safe machinery or to warn of hidden dangers. Yet for such negligence the charitable corporation was exonerated in *Conklin v. John Howard Industrial Home*, 224 Mass. 222.

The doctrine of *respondent superior*, which was invoked by the plaintiff in *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, as the ground for liability of the defendant and rejected by the court, is a doctrine of general application to masters respecting their responsibility to third persons for the negligent acts of their servants performed within the scope of their duty. The doctrine of *respondent superior* was again urged as the ground of liability of the defendant in *Farrigan v. Pevear*, 193 Mass. 147, and rejected after full consideration as inapplicable. If a hospital is to be held

responsible for negligent treatment of patients, there seems to us to be no sound ground for a distinction between the negligence of the managers of the hospital and the negligence of subordinate servants as a basis of liability. A sound ground for distinction between exoneration from liability for the negligence of managers and that of subordinate agents seems equally wanting. Since it is settled that there is no liability for negligence of the latter, it must follow that there is none for that of the former. Otherwise there would be no reason for not overruling *McDonald v. Massachusetts General Hospital*, *ubi supra*.

The inevitable result of our own decisions is to relieve a hospital from liability for negligence of the managers in selecting incompetent subordinate agents, as well as for the negligence of such subordinate agents selected with care. This conclusion is supported by the great weight of authority in other jurisdictions.

The principle has been declared widely that a corporation organized and maintained solely for the treatment of the sick as a public charity cannot be held liable for injuries to a patient caused by the negligence either of its managers or its employees; the basis of decision being that trusts for charities cannot thus be diverted and the benevolent designs of the donors thus be thwarted, and in some instances on general grounds of public policy. *Gable v. Sisters of St. Francis*, 227 Penn. St. 254. *Duncan v. Nebraska Sanitarium & Benevolent Association*, 92 Neb. 162. *Vermillion v. Women's College of Due West*, 104 S. C. 197. *Jensen v. Maine Eye & Ear Infirmary*, 107 Maine, 408. *O'Neill v. Odd Fellows Home*, 89 Ore. 382. *Fordyce v. Woman's Christian National Library Association*, 79 Ark. 550, 562. *Parks v. Northwestern University*, 218 Ill. 381, 385. *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331. *Adams v. University Hospital*, 122 Mo. App. 675. *Downes v. Harper Hospital*, 101 Mich. 555. *Perry v. House of Refuge*, 63 Md. 20. *Abston v. Waldon Academy*, 118 Tenn. 24. The same result is reached in *Maia v. Eastern State Hospital*, 97 Va. 507, though upon reasoning partaking in part of that upon which rests *Benton v. Boston City Hospital*, 140 Mass. 13.

The present state of the law in England has been thought by some to be somewhat in doubt. The question arose in *Heriot's Hospital v. Ross*, 12 Cl. & F. 507, a Scotch appeal, which was an action in the nature of tort for damages against a hospital for

refusal to admit the plaintiff to its benefits. It there was said, at page 513, by Lord Cottenham, "There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Even more emphatic language was used by Lord Campbell on page 518, viz.: "It seems to have been thought, that if charity trustees are guilty of a breach of trust, the persons damaged thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. . . . A doctrine so strange . . . ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it." Since the House of Lords never overrules its own decisions, no matter how erroneous they may be subsequently regarded, *London Street Tramways Co. Ltd. v. London County Council*, [1898] A. C. 375, the law of England would seem to be settled on this point. The case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, goes upon grounds utterly at variance with those established after great consideration in *Hill v. Boston*, 122 Mass. 344, and *Benton v. Boston City Hospital*, 140 Mass. 13. Whatever may be the law of England, our own decisions and the great weight of authority in this country are clear in support of the conclusion here reached.

There are numerous cases where the hospital has been held not liable under the application of a rule stated to exonerate the charity from liability for negligence of servants selected with care, and it has not been necessary to consider the further question of liability for the negligence of managers. See, for example, *Hearns v. Waterbury Hospital*, 66 Conn. 98; *Union Pacific Railway v. Artist*, 9 C. C. A. 14; 60 Fed. Rep. 365; *Taylor v. Protestant Hospital Association*, 85 Ohio St. 90; *Plant System Relief & Hospital Department v. Dickerson*, 118 Ga. 647 (see *Morton v. Savannah Hospital*, 148 Ga. 438); *Wharton v. Warner*, 75 Wash. 470, 476; *Nicholson v. Hospital Association*, 97 Kans. 480; *Morrison v. Henke*, 165 Wis.

166; *Mikota v. Sisters of Mercy*, 183 Iowa, 1378; *Bishop Randall Hospital v. Hartley*, 24 Wyo. 408.

When the negligence of physicians or nurses has been charged against the hospital, the defendant has been held not liable in other cases on the ground that the relation of master and servant does not exist. *Schloendorff v. New York Hospital*, 211 N. Y. 125. *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 820. *Texas Central Railroad v. Zumwalt*, 103 Texas, 603. *Basabo v. Salvation Army, Inc.* 35 R. I. 22, 28. See *Hospital of St. Vincent v. Thompson*, 116 Va. 101.

Decisions, which exonerate steamship companies in the performance of the statutory duty of furnishing ship surgeons provided due care is used in their selection seem to us to rest on a somewhat analogous footing. *O'Brien v. Cunard Steamship Co.* 154 Mass. 272. *The Great Northern*, 163 C. C. A. 660; 251 Fed. Rep. 826. *Allen v. State Steamship Co. Ltd.* 132 N. Y. 91.

Almost all courts reach the conclusion that a public hospital is exonerated from liability to patients injured through negligence of servants or employees. That result has been reached in some instances on the ground that one who accepts the benefactions of a public or private charity enters into such a relation as to exempt his benefactor from liability for negligence of his servants in administering the charity whether money is paid for the treatment or not. This ground of exemption is adopted by decisions of courts of several jurisdictions. *Powers v. Massachusetts Homœopathic Hospital*, 47 C. C. A. 122. *Hordern v. Salvation Army*, 199 N. Y. 233. *Thomas v. German General Benevolent Society*, 168 Cal. 183, 188. See *Stewart v. California Medical Missionary & Benevolent Association*, 178 Cal. 418. This principle manifestly would exonerate the defendant in the case at bar.

There are a few decisions which hold the hospital responsible for negligence of the managers in selecting physicians and servants, although not responsible for the negligence of physicians and servants when carefully selected. *Gützhoffen v. Sisters of Holy Cross Hospital Association*, 32 Utah, 46. *St. Paul's Sanitarium v. Williamson*, 164 S. W. Rep. 36. This view at first sight is apparently supported by *Illinois Central Railway v. Buchanan*, 126 Ky. 288, but that decision rests upon the peculiar relation of the railway company to its employees, for whose benefit the hospital was

maintained. It is not in conflict with the general current of authority, as is shown by *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 337. Other cases go so far as to hold the hospital liable even for the negligence of surgeons, agents and servants carefully selected on the doctrine of *respondeat superior*. See *Tucker v. Mobile Infirmary Association*, 191 Ala. 572, wherein the great weight of authority is recognized as being the other way and where there is a dissenting opinion. See *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 428, a decision soon modified by legislation placing the exoneration of a hospital on the same footing as that which we have here decided. Gen. Laws of R. I. 1909, c. 213, § 38. In *Donaldson v. General Public Hospital in St. John*, 30 New Brun. 279, the decision was by a divided court. See also *Lavere v. Smith's Falls Public Hospital*, 35 Ont. Law Rep. 98, where the judgment is rested in part upon *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, which, as has been pointed out, is at variance with the law of this Commonwealth. Both these classes of decisions hold the hospital to a higher degree of responsibility than even the host of an invited guest, *Massaletti v. Fitzroy*, 228 Mass. 487, *Southcote v. Stanley*, 1 H. & N. 247, 249, and exclude all consideration of the fact that the hospital is not engaged in ordinary commercial transactions with all the liabilities thereby implied. Manifestly these cases are at variance with our own decisions and with the great weight of authority elsewhere.

The allegation of an oral contract with the defendant for careful treatment adds no element of liability to those which would exist otherwise. There can be no liability in contract such as here is alleged, if none exists in tort. The whole matter relates to the execution of the public charity administered by the defendant, and is governed by the same principles in whatever aspect presented. *Paterlini v. Memorial Hospital Association*, 160 C. C. A. 49; 247 Fed. Rep. 639, 644; certiorari denied, 246 U. S. 665. *Duncan v. St. Luke's Hospital*, 113 App. Div. (N. Y.) 68, 73. *Magnuson v. Swedish Hospital*, 99 Wash. 399, 403.

The so called death statute, St. 1907, c. 375, imposes no liability upon a hospital toward a patient under the circumstances here alleged. That statute imposes a liability when "a person or corporation by his or its negligence, or by the negligence of his or its agents or servants while engaged in his or its business, causes the

death of a person who is in the exercise of due care." The reasons already stated show that the terms of that statute are not applicable to a case where, from the nature of the corporation as a public charitable hospital, it cannot be guilty of negligence in respect of the treatment of its patients pursuant to the great charitable purpose for which it was established. This is but an inevitable application of the principle illustrated in *Donohue v. Newburyport*, 211 Mass. 561, *Brooks v. Fitchburg & Leominster Street Railway*, 200 Mass. 8, and *Zoulalian v. New England Sanatorium & Benevolent Association*, 230 Mass. 102. Plainly there is nothing at variance with this conclusion in *Flynn v. Lewis*, 231 Mass. 550.

In each case let the entry be

Judgment for defendant affirmed.

THEODORE P. DARVIRIS vs. BOSTON SAFE DEPOSIT AND TRUST
COMPANY.

Norfolk. November 21, 1919. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Equity Jurisdiction, To enjoin ejectment of tenant by landlord, "He who seeks equity must do equity." *Landlord and Tenant*.

One who is occupying real estate under a lease in writing cannot maintain a suit in equity to enjoin the lessor from compelling him to vacate the premises in accordance with a condition in the lease giving the lessor a right of re-entry upon a failure of the lessee to pay rent as called for by the lease, where it appears that the plaintiff's failure to pay his rent when due was so settled a habit as to be described rightly as a general course of conduct and that the circumstances of continued delay were annoying in nature and were accompanied by frequent drawing of checks when there were no funds to meet them.

BILL IN EQUITY, filed in the Superior Court on March 31, 1919, to enjoin the defendant, whose property, numbered 1351 on Beacon Street in Brookline, the plaintiff was occupying under a lease from the defendant, from interfering with the plaintiff's occupancy and quiet enjoyment of the premises.

In the Superior Court the case was heard by *Fox, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. The judge made the following finding and ruling:

"The plaintiff had generally been slow in the payment of his rent, and had been warned by the landlord's agent that unless he paid more promptly he would have to vacate the premises. At the time of the entry, the rent for two months was in arrears. It does not seem to be a case for equitable relief. The bill is to be dismissed with costs."

A decree dismissing the bill was entered in accordance with the foregoing order; and the plaintiff appealed.

J. W. Milne, for the plaintiff.

C. M. Rogerson, for the defendant.

RUGG, C. J. The plaintiff, a tenant under a written lease for a term of three years, half expired, by this suit in equity seeks to enjoin expulsion of himself from the demised premises by his lessor, which, pursuant to a condition of the lease, has entered for non-payment of rent and given notice of intention to terminate the lease. The case was tried before a judge of the Superior Court, who found that "The plaintiff had generally been slow in the payment of his rent, and had been warned by the landlord's agent that unless he paid more promptly he would have to vacate the premises. At the time of the entry, the rent for two months was in arrears." The evidence is reported. It came chiefly from witnesses who testified orally. A careful examination shows that the finding of facts made by the judge was not only not plainly wrong but fully warranted. Therefore it must stand. The judge ruled that a case for equitable relief was not made out and entered a decree dismissing the bill. The plaintiff's appeal brings the case here.

It was said by Chief Justice Morton in *Mactier v. Osborn*, 146 Mass. 399, at page 402, "The result of the authorities, supported by sound principle, is, that where there has been a breach of a covenant to pay rent equity will relieve against a forfeiture although the breach is wilful on the part of the lessee." It further was said by Mr. Justice Loring in *Gordon v. Richardson*, 185 Mass. 492, where all the Massachusetts cases and numerous other authorities are collected, that "The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid the very thing is done for which the security was given.

Although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief."

These just principles are accepted in all their amplitude. They do not reach, however, to the case at bar. We have here a lease for a comparatively short term. The failure to pay rent when due was not once or twice, but was so settled a habit as to be rightly described as a general course of conduct. The circumstances of continued delay were annoying in nature and were accompanied by the frequent drawing of checks when there were no funds to meet them. This is not an instance of temporary financial embarrassment or fleeting wilfulness of purpose. Much less is it the result of accident or mistake. When measured by the term of the lease, it has become a custom. The state of being behindhand appears to have been not only wilful but contumacious. There is, however, no finding of bad faith.

It is a familiar maxim in equity that he who seeks equity must do equity. The plaintiff has made an express contract in writing for the payment of rent at specified times, with provision, in case of failure, for entry by the landlord. He asks equity to relieve him from the consequences stipulated in his agreement to follow from failure to perform that obligation. While in the ordinary case of delayed payment of rent that will be done, equity will not interfere in his behalf where, as in the case at bar, the plaintiff has violated fundamental principles of fair dealing.

Decree affirmed.

NATHANIEL P. BEAMAN *vs.* HENRY GERRISH, JR., & another.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* SAME.

ARTHUR W. BURKE *vs.* NATHANIEL P. BEAMAN.

Suffolk. November 21, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Bills and Notes, Construction. Corporation, Validity of issue of shares, Returns, Liability of director. Deceit. Evidence, Opinion: expert. Words, "Payable."

Upon a promissory note reading, "Four years after date I promise to pay to the order of B two thousand . . . dollars. Payable after three years, at the rate of \$500 quarterly, with interest at 6%," \$500 of the principal sum became due three years from the date of the note and \$500 every three months thereafter during the fourth year.

The word "payable" in negotiable instruments commonly implies imperative obligation on the part of the maker unless accompanied by additional words expressive of option vested in the maker.

The entire capital stock of a Massachusetts corporation, organized in 1898, was owned by three persons. Substantial profits were made each year. At the close of each year, by agreement of the directors, who at all times owned all of or a controlling interest in the capital stock of the company, the net profits were divided among two of the directors and a bookkeeper of the corporation. This division was not proportionate to the holdings of capital stock. The amounts thus allotted to each were credited to their accounts upon the books of the corporation. In 1909, at a time when \$24,000, thus credited, stood on the corporation's books to the credit of one of the directors, who was the manager of the business and the holder of a large majority of the capital stock, the stockholders, at a meeting at which all the stock was represented, voted to issue preferred stock in that amount and to transfer it to the majority holder of stock, to be paid for by deducting \$20,000 from the amount standing to his credit upon the corporation's books. This was done with the assent of all the stockholders and directors. A subsequent purchaser of the shares of preferred stock thus issued brought an action of deceit for damages alleged by him to have resulted from false representations inducing him to purchase the stock and contended that one of such false representations was that such issue of preferred stock was valid. *Held*, that such representation was true because the issue of preferred stock was valid.

A purchaser of shares of the capital stock of a corporation cannot maintain against a director of the corporation an action of tort for deceit to recover damages alleged to have been suffered by him by reason of false statements contained in returns made by the corporation to the commissioner of corporations, as

required by St. 1903, c. 437, §§ 45, 46, which were signed and sworn to by the director, where it does not appear that the director ever had any relations with the purchaser before the sale of the stock, or that the director signed the statements with knowledge of their falsity or without belief in their truth or in reckless carelessness as to whether they were true or false.

At the trial of an action at law, where one question related to the validity of an issue of preferred stock to one who was the chief stockholder, one of the directors and the general manager of a Massachusetts corporation, in payment for a sum standing to his credit on the corporation's books which was an accumulation of annual divisions of profits of the corporation, an inquiry of a certified public accountant, not in the employ of the corporation, as to what would be the reasonable minimum compensation for the executive officers of the corporation during a period as to which he had examined the corporation's books of account, properly may be excluded.

FOUR ACTIONS OF CONTRACT by the payee of two promissory notes dated August 25, 1914, against Henry Gerrish, Jr., the maker, and Arthur W. Burke, an indorser, for instalments alleged to be due thereon. Writs dated, respectively, December 13, 1916, March 2 and September 11, 1917, and May 29, 1918; also an action of

TORT OR CONTRACT by Arthur W. Burke against Nathaniel P. Beaman, with a declaration in three counts, the allegations of the first count being that the plaintiff was induced by fraudulent misrepresentations of the defendant, the treasurer of the Parsons Manufacturing Company, to purchase from him on June 3, 1914, fifty shares of the preferred stock of that corporation, the fraudulent representations being statements relating to the amount of business and the financial condition of the corporation, and that "the said shares of stock had been validly issued in accordance with the laws of the Commonwealth of Massachusetts and were fully paid for." The plaintiff in the second count alleged a failure of consideration for such sale, whereby the price paid by the plaintiff for the stock, \$5,000, became due to the plaintiff, and the third count was for money had and received by the defendant to the plaintiff's use. Writ dated March 30, 1917.

The five actions were tried together before *Fessenden, J.* The material evidence is described in the opinion. The expert witness, referred to in the fourth numbered paragraph of the opinion, was a certified public accountant. At the close of the evidence Burke asked that the following among other instructions be given to the jury in all the actions:

"9. If the preferred stock of the Parsons Manufacturing Company was issued to the defendant without any consideration passing from the defendant to the corporation, the stock was not fully paid stock and was illegally issued.

"10. Though there was credited to the defendant on the books of the Parsons Manufacturing Company from time to time certain sums of money as a debt of the said corporation to the defendant without a vote of the Directors or of the stockholders declaring a dividend on the stock of the said corporation, the pretended debt of the corporation to the defendant did not exist and stock later issued to the defendant in consideration only of a cancellation of the said pretended debt was issued without consideration and in violation of law.

"11. If the defendant and one Gerrish as shareholders and directors of the Parsons Manufacturing Company had been in the habit of dividing between them the net profits of the business conducted by the said corporation without any vote declaring a dividend on its stock, whatever might have been the rights of the defendant to retain money so withdrawn, a mere book entry transferring money to the credit of the defendant would not create a legal indebtedness of the corporation to the plaintiff but the money remained undivided profits belonging to and in the possession of the corporation."

Burke also asked that the following instructions be given to the jury in his action against Beaman:

"24. If the plaintiff bought from the defendant stock in the Parsons Manufacturing Company in reliance upon false representations of fact contained in a Certificate of Condition of the Parsons Manufacturing Company signed and sworn to by the defendant and filed with the Commissioner of Corporations, the plaintiff is entitled to recover from the defendant in this action.

"25. On all the evidence the Parsons Manufacturing Company was not indebted to the defendant in 1909 in the sum of \$20,000 and the preferred stock issued to him at that time did not become fully paid stock as a result of a cancellation of the said supposed indebtedness to the defendant."

Burke further asked that the following instructions be given to the jury in all the actions against him:

"23. If the defendant Burke indorsed the notes in suit in reliance upon false representations of fact in a Certificate of Condition of the Parsons Manufacturing Company, signed and sworn to by the plaintiff and filed with the Commissioner of Corporations, the plaintiff cannot recover against the defendant Burke.

"24. On all the evidence the Parsons Manufacturing Company was not indebted to the plaintiff in 1909 in the sum of \$20,000, and the preferred stock issued to him at that time did not become fully paid stock as a result of a cancellation of the said supposed indebtedness to the plaintiff."

Burke also asked that the following instructions be given to the jury in the actions for instalments alleged to be due on the notes in suit previous to their final due date:

"A. The provision in the note in suit 'payable after two years at the rate of \$500 quarterly' means as a matter of law that the maker or indorser had the right if he chose to make payments on account before it fell due, but does not impose on them an obligation to pay before the expiration of the number of years named at the beginning of the instrument as the date when the money should be paid.

"B. The first part of the note in suit is a complete promise to pay a specified number of dollars on a specified date and standing by itself would be a complete negotiable instrument and the subsequent provision 'payable after one year at the rate of \$500 quarterly' should be interpreted in harmony with the rest of the note and not in contradiction to it.

"C. Without a provision in a note giving the maker an option to pay in instalments before maturity, the maker would have no right to make such payments in advance and would be liable for interest on the whole amount of the note until maturity.

"D. On all the evidence this action was prematurely brought.

"E. On all the evidence the provision in the note in suit 'payable after two years at the rate of \$500 quarterly' meant that the maker and indorser had an option to pay before it fell due but not that they were bound to make any payment before the expiration of the number of years named in the earlier part of the note as the date when it must be paid.

"F. If you find that the defendant Gerrish by inserting in the note in suit the provision that it was payable after a specified

number of years at the rate of \$500 quarterly so that he could if he chose make the payments in instalments in advance of the time when he had to pay the whole of it in accordance with the earlier provisions of the note and the plaintiff understood that it was put in there for that purpose then you must find for the defendant Burke because this action was brought before any money was due the plaintiff on the note in suit."

All of the foregoing requests for instructions were refused by the judge.

The judge directed Burke to elect between the counts in the action in which he was plaintiff, and he elected to go to the jury on the first count only.

The judge submitted in each action a special question to the jury, which, with the jury's answer thereto, was in substance as follows:

"Did . . . Beaman and Henry Gerrish, Jr., conspire and confederate together to deceive and defraud Burke in the manner set forth by Burke in his declaration?" The jury answered "No."

The jury found for the plaintiff in the first four actions, the verdict in the first action being \$631.25; in the second action, \$631.25; in the third action, \$1,262.50, and in the fourth action, \$1,893.75. In the fifth action the finding was for the defendant. Burke alleged exceptions in all the actions.

S. R. Wrightington, for Burke.

G. Hoague, for Beaman.

RUGG, C. J. Four of these actions are in contract to recover instalments alleged to be due upon two promissory notes payable to the order of Beaman, signed by Gerrish as maker and Burke as indorser, these two being defendants in each of these actions. The fifth action, as it finally went to the jury upon count one alone of the declaration, is in tort by Burke against Beaman alleging the purchase from him by Burke of fifty shares of stock in a corporation, induced by Beaman's deceit in misrepresenting the assets and liabilities of the corporation and other facts material to the value of the stock.

1. No question now is made respecting the signatures or protest of the notes. It is contended that three of the actions on the notes are prematurely brought. That contention rests on the form of the notes. One note, typical of the others, is of the tenor following, as far as concerns this point, "Four years after date

I promise to pay to the order of Nathaniel P. Beaman Two Thousand and no/100 Dollars. Payable after three years, at the rate of \$500.00 quarterly, with interest at 6%." Although not phrased with elegance, the intent of the parties is plain enough from the terms of this contract. As matter of construction these words mean that beginning with the expiration of three years from the date of the note, the sum of \$500 is to be paid quarter yearly in such way that the entire principal will be paid at the expiration of four years from date. If it stood alone, the first sentence would be a clear and single promise to pay on four years' time. That sentence, however, does not stand alone. It is modified by the second sentence, which explains and qualifies the simplicity of the earlier sentence by requiring the payment to be made in equal quarterly instalments during the final year before the ultimate maturity of the balance. The word "payable" in negotiable instruments, commonly implies imperative obligation on the part of the maker unless accompanied by additional words expressive of option vested in the maker. As thus construed, with rational effect given to all the words used, the two sentences, which together express the promise, are not mutually repugnant but are harmonious and consistent. *Ever v. Myrick*, 1 Cush. 16.

2. The controversy centres about the purchase by Burke in 1914 of fifty shares of the preferred stock of the Parsons Manufacturing Company organized under Massachusetts laws in 1898. The entire capital stock par value \$10,000 was paid in originally by a brother of Beaman, and was in 1900 purchased by him of his brother's executors. Within a short time thereafter, Gerrish purchased \$1,000 of par value of the common stock. For a time a bookkeeper, Crosby, owned \$2,000 par value of the stock, which later was acquired by Gerrish. One share was held by William S. Beaman, another brother of Nathaniel P. Beaman. From 1902 to 1914 the directors of the corporations were the two Beamans and Gerrish. The testimony of Nathaniel P. Beaman, which was not contradicted and upon which Burke relies as showing that the stock purchased by him was not validly issued, was as follows: "that at the end of each financial year of the corporation the net profits made by the company were ascertained in the usual way by agreement of Nathaniel P. Beaman, Gerrish and Crosby, and the proportion that Beaman and Gerrish should receive was agreed

upon and transferred on the books to them; this proportion was not strictly in accordance with the amount of stock held by each; that Gerrish received at first one third of the net profits and afterwards one half of the net profits, and Beaman received the balance; that from 1900 to and including 1914 substantial profits were made every year which were divided as above set forth; that no preferred stock was issued until the fall of 1909; that at that time owing to the fact that he had withdrawn only a portion of his share of the profits credited to him upon the company's books, there was due to him from the company a sum in excess of \$24,000; that as he was about to undergo a major operation which might prove fatal, Gerrish suggested to him that preferred stock to the amount of \$20,000 should be issued by the company, and accordingly at a meeting duly held, at which all of the stockholders of the company were represented, it was voted to issue preferred stock to the amount of \$20,000 to him; that it was paid for by him by deducting the sum of \$20,000 from the amount due to him from the company, leaving a balance due on his account of something over \$4,000; that this arrangement was assented to by all of the stockholders and all of the directors."

The preferred stock issued to Nathaniel P. Beaman under these circumstances was validly issued. If the proportion of the profits credited to Nathaniel P. Beaman on the books of the corporation be treated as dividends not collected but left with the company, the one who chiefly was harmed by this was Beaman, because he owned all the stock of the corporation not owned by Gerrish except the single share held in the name of his brother, and a larger amount was credited to Gerrish than he would have been entitled to as dividends upon his stock and a correspondingly less amount to Nathaniel P. Beaman. If it be treated as payment of salary, no salary or payment in way of compensation for services rendered by Nathaniel P. Beaman having been made although he was at all times the manager of the business, that also was a matter about which he and Gerrish were mainly concerned. The entire business of the corporation for a long series of years was conducted by Nathaniel P. Beaman and Gerrish. That was the usual course of conduct of the affairs of the corporation. They constituted a majority of the board of directors and during most of the period held all the stock with the exception of a single share, the beneficial

interest of which apparently belonged to Nathaniel P. Beaman although held by his brother. Even if owned absolutely by the brother, no different conclusion would be reached. That single stockholder seemingly never has complained. All this matter of credit to Beaman was before the stockholders and directors at the meetings of 1909 and was assented to by them. It was in substance and effect approved. Nothing appears to have been concealed or juggled. Fair dealing manifestly required that either by way of dividends on his stock or of compensation for valuable services rendered there was obligation from the corporation to Beaman. There is no suggestion and no foundation for the inference that the amount credited to him on the books of the corporation was excessive or anything more than justly was due him. The precise form which the transactions took is not of much consequence in view of the substantial ratification and approval of the whole matter, both by all the stockholders and directors at meetings duly held, long before Burke had any relation to the corporation. In the light of all these circumstances it cannot be said that the preferred stock issued was not valid. *Lester v. Webb*, 1 Allen, 34. *Sherman v. Fitch*, 98 Mass. 59, 64. *Produce Exchange Trust Co. v. Bieberbach*, 176 Mass. 577, 582. *North Anson Lumber Co. v. Smith*, 209 Mass. 333. *Albani v. Evening Traveler Co.* 220 Mass. 20, 25.

3. An effort is made to hold Nathaniel P. Beaman responsible for alleged false representations contained in the annual certificates of condition signed by him as one of the directors of the corporation and filed with the commissioner of corporations under St. 1903, c. 437, §§ 45, 46. Even if it be assumed that there was evidence tending to show such false statements, there is nothing to indicate that they were signed by Beaman with any fraudulent purpose. There is in the record no foundation for the inference that the statements if false were signed by Beaman with knowledge of their falsity, or without belief in their truth, or in reckless carelessness whether true or false. He had no relations with Burke and the latter testified that, although he had seen Beaman, they had no conversation. Manifestly no representations were made to Burke in the ordinary sense, and Beaman had no purpose or intention that Burke should rely upon the statements in the returns. Therefore, he cannot be held personally

under the circumstances here disclosed. *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 578. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138, 146. *Derry v. Peek*, 14 App. Cas. 337, 374, 375. The case at bar is distinguishable from *Bates v. Cushman*, 230 Mass. 167, and cases of that class, where a positive statement of fact is made as of one's own knowledge when there is no such knowledge, which is the equivalent of reckless disregard of the truth.

There is strong intimation if not a precise declaration to the effect that an action of deceit in favor of one of the general public does not lie against an officer of a domestic corporation for false statements contained in such certificates as those here in evidence, in the absence of express statutory provision to that end, in *Hunnewell v. Duxbury*, 154 Mass. 286, 288. See *Cheney v. Dickinson*, 96 C. C. A. 314; 172 Fed. Rep. 109. Compare *Ver Wys v. Vander Mey*, 206 Mich. 499.

It is a quite different matter to hold the corporation itself bound or affected by such returns, *Steel v. Webster*, 188 Mass. 478, 480, *Brackett v. Commonwealth*, 223 Mass. 119, 127, or to hold directors to a liability specifically imposed by statute based on falsity in the return, *Felker v. Standard Yarn Co.* 148 Mass. 226, or when representations are made to a commercial agency or otherwise for the express purpose of securing credit, *Davis v. Louisville Trust Co.* 104 C. C. A. 24; 181 Fed. Rep. 10, *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31, 34, or to hold promoters for false representations in a prospectus, *Peek v. Gurney*, L. R. 6 H. L. 377.

It is not necessary to consider what liability there may be, if any, where the connection between the representation and the person relying upon it is closer than here disclosed, or where the purpose of the person making the statement is fraudulent. The decisions of courts of other States, upon which reliance is placed by *Burke*, are founded upon different statutes or upon other principles not prevailing here and need not be reviewed one by one.

4. The inquiry of the expert witness, as to the reasonable minimum compensation for the executive officers of the Parsons Manufacturing Company during the period which he examined, rightly was excluded. It does not appear that he was qualified to testify to the point or that his examination of the books covered

time sufficient to make his evidence pertinent. No offer of proof was made. The record does not disclose grounds to which such testimony would have been relevant.

It follows from what has been said that all the requests for rulings, which need not be recited in detail, rightly were denied.

Exceptions overruled.

HANNAH T. OSGOOD vs. TAX COMMISSIONER.

Worcester. December 1, 1919. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Tax, On income. Sale. Purchase. Corporation, Reorganization. Words, "Sales," "Purchases."

If the directors of a business corporation, incorporated under the laws of the State of Maine and having a usual place of business in this Commonwealth, which has outstanding both preferred and common stock, cause to be organized under the laws of the State of Maine another corporation, issuing common stock only, and all of the stockholders, both preferred and common, of the original corporation exchange their shares for shares of stock of the new corporation, after which the original corporation transfers all its property to the new corporation, which continues the business as before; and if an inhabitant of this Commonwealth, who owned shares of the preferred and of the common stock of the original corporation, exchanged them for shares of stock of the new corporation, which were of greater value, such transaction is a sale of the shares in the original, and a purchase of the shares in the new corporation and the gain resulting therefrom is subject to a tax under St. 1916, c. 269, § 5 (c).

PETITION, filed in the Superior Court on June 4, 1919, under St. 1916, c. 269, § 20, appealing from a refusal of the Tax Commissioner to abate an income tax of three per cent assessed under St. 1916, c. 269, § 5 (c), on the sum of \$3,944.25 alleged by the Tax Commissioner to have been received by the petitioner as a gain on a sale of one thousand three hundred shares of the preferred and one thousand shares of the common stock of the Draper Company for which she received four thousand one hundred twenty-five shares of the capital stock of the Draper Corporation under the circumstances described in the opinion.

The case was heard in the Superior Court by *Lawton, J.*, without a jury, upon an agreed statement of facts. The material facts are stated in the opinion. It also was agreed solely for the purposes of this case that the tax as computed by the Tax Commissioner was

excessive, and that, if a tax should be assessed, it should not be in excess of \$2,853.75. The judge reported the case to this court for determination, it being agreed that, if the petitioner was not properly subject to taxation on account of the transaction in question, judgment was to be entered for the petitioner in the sum of \$4,046.12; otherwise judgment was to be entered for the petitioner in the sum of \$1,119.03, with interest from July 7, 1919, and costs in either event.

P. Nichols, (W. Williams with him,) for the petitioner.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

RUGG, C. J. This is a petition under St. 1916, c. 269, § 20. It involves the validity of a tax assessed on an alleged gain in the purchases or sales of intangible personal property under § 5 (c) of said act. The salient facts are that the petitioner on January 1, 1916, was the owner of one thousand three hundred shares of the preferred and one thousand shares of the common stock of the Draper Company, a Maine corporation conducting an extensive manufacturing business at Hopedale in this Commonwealth. That corporation had outstanding preferred stock of the par value of \$2,000,000 and common stock of the par value of \$6,000,000. The directors of that corporation, in June, 1916, caused a new corporation to be organized under the laws of Maine, called the Draper Corporation, which voted to issue its stock, all being common, of a par value of \$17,500,000, in exchange for the stock of the Draper Company, two and one half of its shares for each one share of the common stock of the old company, and one and one quarter of its shares for each one share of the preferred stock of the old company. The petitioner accepted the offer to exchange on this basis and received for the surrender of her shares of stock in the old company four thousand one hundred twenty-five shares of stock in the Draper Corporation. The new corporation became the owner of substantially all of the stock of the old company and caused to be transferred to itself all the assets of the old company, and carried on the business of the latter through the same officers without interruption and without outward indication of change. The Tax Commissioner assessed a tax upon the gain which he ascertained by subtracting the value of the shares in the old company on January 1, 1916, (§ 7 of said act,) from the value of the shares of the new company at the time of the exchange in July of

that year. No question now is raised as to the method of ascertaining the tax. The amounts have been agreed upon. The question is whether that gain under the circumstances disclosed is subject to taxation under St. 1916, c. 269, § 5 (c). Its governing words are, "The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not the said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum."

Tax statutes must be construed strictly. The power to tax must be conferred by plain words or it does not exist. It is not to be extended by implication or by invoking the spirit of the law. *Sewall v. Jones*, 9 Pick. 412. *Hill v. Treasurer & Receiver General*, 229 Mass. 474, 475.

The point to be decided is whether the transaction in which the petitioner engaged rightly can be said to be comprehended within the statutory words "purchases or sales."

Various definitions of "sale" are to be found in decisions and among text book writers. Those commonly given when the attempt is made to fix with accuracy its meaning are familiar. It is said in Benjamin on Sales, § 1, to be "a transfer of the absolute or general property in a thing for a price in money." In § 2 that author elaborates, with references to authorities, the point that the price must be in money and that any other consideration constitutes barter or contract for the transfer of property. In *Five Per Cent Cases*, 110 U. S. 471, 478, Mr. Justice Gray said, "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent." *Gardner v. Lane*, 12 Allen, 39, 43. Price in money is essential to a strict sale. The transfer of title for a consideration of a different nature is a barter or exchange. See, for other definitions, 35 Cyc. 25; 23 R. C. L. 1186.. On the other hand, there are numerous cases where the word "sale" in statutes has been given a broader signification. The modern tendency is in that direction. In *Gallus v. Elmer*, 193 Mass. 106, at page 109, it was said by Mr. Justice Hammond, in holding a transfer of property by way of accord and satisfaction of a pre-existing debt to be a sale contrary to the sales in bulk act, "While it is true that in its strictest sense a sale is a transfer of personal property in consideration of money paid or to be paid, still in the interpretation of statutes it is often held to include barter and any transfer of

personal property for a valuable consideration." Said Chief Justice Bigelow, in *Howard v. Harris*, 8 Allen, 297, at page 299: "In a general and popular sense, the sale of an article signifies the transfer of property from one person to another for a consideration of value, without reference to the particular mode in which the consideration is paid. . . . The legal distinction between a sale and an exchange is a purely artificial one; the rules of law are the same as applied to both transactions." A statute forbidding sales of intoxicating liquor has been held to include barter and exchange as well as strict sales. *Commonwealth v. Clark*, 14 Gray, 367, 372. *Commonwealth v. Woelz*, 219 Mass. 37, 38. Exchanges and contracts to exchange are included within the definition of "sale" in the sales act. St. 1908, c. 237, §§ 1, 9 (2), 75. Williston on Sales, §§ 166, 170. See also *Arnold v. North American Chemical Co.* 232 Mass. 196, 199. *Goward v. Waters*, 98 Mass. 596. *Friend v. Childs Dining Hall Co.* 231 Mass. 65, 68, 69. The word "sales" in the statute is used in combination with the word "purchases." That is a word in its abstract meaning of somewhat more comprehensive signification. "It includes every lawful method of coming to an estate by the act of a party, as opposed to the act of law." *Burt v. Merchants' Ins. Co.* 106 Mass. 356, 364.

The aim of the court in every instance must be to ascertain as nearly as possible the intent and purpose of the Legislature.

On analysis, the transaction out of which this controversy arises was this: The petitioner was the owner of stocks of an ascertained value on January 1, 1916. In the following July, without selling these stocks for cash, she used them as the consideration with which to subscribe for and acquire by purchase other stocks in a new and different corporation. Although the property owned by the new corporation was identical with that owned by the old corporation, it nevertheless plainly was a different legal entity. *Brighton Packing Co. v. Butchers Slaughtering & Melting Association*, 211 Mass. 398. *Marsch v. Southern New England Railroad*, 230 Mass. 483, 498. The stock obtained by the petitioner through exchange was different in kind and not merely in degree from that which she owned before. It was not the same corporation and the stock itself was different in nature. A change of investment had been made both in name and in essence. It would seem something of a wrench to say that the disposal of the stock in the old corpora-

tion for stock in the new is not a sale for purposes of taxation, when, if the same transaction was presented for consideration under the sales act, it would inevitably be treated as a sale. It hardly would be consistent to hold that exchanging grain for spirituous liquors was a sale constituting a crime, as was held by this court in *Commonwealth v. Clark*, 14 Gray, 367, and to say that exchanging stock in one corporation for stock in another corporation was not a sale for taxation purposes. Whether the disposal of the stock in the old company be treated as a strict sale or not, there seems to be no escape from holding that the procurement of the stock in the new corporation was a purchase. That word, unless narrowed by its context, signifies the acquisition of title to any commodity for cash, on credit, or for any other equivalent agreed upon. This is its ordinary meaning according to the common understanding of the business world. *Berger v. United States Steel Corp.* 18 Dick. 809, 817. Doubtless there are connections in which the word is used in a more restricted sense. *Robotham v. Prudential Ins. Co.* 19 Dick. 673, 685. *People v. Duffy-McInnerney Co.* 122 App. Div. (N. Y.) 336, affirmed in 193 N. Y. 636. There is nothing in the context of the present statute to indicate limitations upon the natural meaning of the word. "Purchase," both in its popular and in its legal signification is broad enough to include the acquirement of stock through subscription as well as by bidding on the stock exchange.

Tested by the difference in value of the stocks purchased as compared with those exchanged for them at their appraisal at the time fixed by § 7 of the act, the petitioner had realized a gain. This is not the calculation of a mere paper profit or an unrealized increase in value, which is not taxable under the act. *Tax Commissioner v. Putnam*, 227 Mass. 522, 530. The gain had materialized by procuring title to a wholly different kind of stock in a new corporation, whose market value was definite and ascertained. The complainant had wholly parted with the old and become the legal owner of new property. It follows that a tax on this gain was lawful.

In accordance with the terms of the report, the entry may be, judgment for the petitioner in the sum of \$1,119.03 with interest from July 7, 1919, and costs.

So ordered.

NATHANIEL H. STONE & another, trustees, vs. TAX COMMISSIONER.

Norfolk. December 1, 1919. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Tax, On income. Sale. Purchase. Corporation.

In February, 1917, an inhabitant of this Commonwealth exchanged shares of the common stock of a corporation organized in the State of New Jersey, of the par value of \$100, for four times as many shares of the common stock of a corporation organized in the State of New York, which had acquired all of the assets of the New Jersey corporation and had no other property and issued its stock, without par value, almost entirely in exchange for the stock of the New Jersey corporation. No gain resulted from this exchange. In October, 1917, the same shareholder accepted an offer made by the directors of the New York corporation to exchange his shares therein, share for share, for shares in another New York corporation, of a much larger capitalization, which was organized to acquire the common stock of four corporations engaged in the manufacturing of products which could be conducted more economically under a single management and issued substantially all of its capital stock for that purpose. By the last exchange the shareholder acquired shares worth more than those he gave. *Held*, that such exchanges were sales and purchases of intangible personal property under St. 1916, c. 269, § 5 (c), and that the gain resulting therefrom was subject to the income tax imposed by that statute. Following *Osgood v. Tax Commissioner*, *ante*, 88.

PETITION, filed in the Superior Court on March 21, 1919, under St. 1916, c. 269, § 20, appealing from a refusal of the Tax Commissioner to abate an income tax of three per cent assessed under St. 1916, c. 269, § 5 (c), on the sum of \$15,210, alleged by the Tax Commissioner to have been received by the petitioners as a gain on the sale and purchase of intangible personal property described in the opinion.

In the Superior Court the case was heard by *Sisk*, J., without a jury, who reported it to this court for determination.

R. Ernst, for the petitioners.

W. H. Hitchcock, Assistant Attorney General, for the respondent.

RUGG, C. J. This is a petition under St. 1916, c. 269, § 20, to recover taxes assessed under § 5 (c) on alleged "gains" from "purchases or sales of intangible personal property." The case comes before us on a report by a judge of the Superior Court which states

that "the facts in this case have been agreed upon by all parties in the pleadings." Those facts so far as material to this decision as set forth in the petition or admitted by the answer are as follows: The petitioners on January 1, 1916, owned three hundred and ninety shares of the common stock of the National Carbon Company, a New Jersey corporation, each share of the par value of \$100. On February 1, 1917, the petitioners accepted an offer to exchange that stock for common stock in the National Carbon Company, Inc., a corporation incorporated under the laws of New York in January, 1917, on the basis of four shares of the common stock of the New York corporation (which had no par value) for each one share of the common stock of the New Jersey corporation, the New York corporation having acquired all of the assets of the New Jersey corporation and having no other property. The petitioners accepted the offer and made the exchange. Substantially all the stock of the New York corporation was issued in exchange for the stock of the New Jersey corporation. In October, 1917, the directors of the New York corporation sent to the petitioners notice of an offer made in behalf of a corporation to be formed in New York, to be called Union Carbide and Carbon Corporation (hereafter designated the Union Company), to exchange shares of its capital stock for the common stock of the National Carbon Company, Inc. (hereafter called the National Company) share for share. The Union Company had an authorized issue of three million shares of stock, all of one class without nominal or par value. The petitioners accepted the offer and in October, 1917, exchanged fifteen hundred and sixty shares of National Company common stock for an equal number of shares of Union Company stock. The Union Company at the same time acquired not only substantially all the common stock of the National Company, but also that of three other corporations engaged in manufacturing products which could be conducted more economically under a single management. Substantially all the capital stock of the Union Company was issued for the acquisition of stock of the four companies, and it owned no other assets. The market value of the common stock of the New Jersey Company was fixed by the Tax Commissioner at \$165 per share. The petitioners took the value of each share of the National Company at one fourth that amount, or \$41.25 per share. The market value of

the Union Company was \$51 per share on the date when petitioners made exchange for that stock. The question is, whether the petitioners are subject to taxation for this difference of \$9.75 per share as a gain under St. 1916, c. 269, § 5 (c).

This case was argued at the same time with *Osgood v. Tax Commissioner*, ante, 88, just decided. It is governed by the same principles as those there regarded as controlling. In the case at bar, however, the petitioners by the exchange acquired stock in a new corporation of much larger assets and through its subsidiary companies conducting a far more extensive business than did the corporation, shares in which they held originally. The transactions in which the petitioners participated were more complicated and resulted in a combination of more diverse elements than those presented in the *Osgood* case. Even more plainly than in that case, the petitioners have acquired new stock in a different corporate entity. Their present stock represents in a sense part ownership in assets much larger in amount and diversified in character than did the stock which they used for exchange. They now own stock obviously disparate in every respect compared with that which they formerly held. Their gain has been realized by ownership of distinct and separate property of higher value and is not a mere paper profit.

Judgment for the Tax Commissioner.

**DAVID C. BURGESS & others vs. MAYOR AND ALDERMEN OF
BROCKTON & another.**

SAME vs. SAME.

Suffolk. Plymouth. January 5, 1920. — February 26, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Motor Vehicle, License to operate for hire. *Carrier*, Of passengers. *Constitutional Law*, Police power. *Municipal Corporations*, By-laws and ordinances, Power to license and to revoke license. *License*. *Street Railway*. *Monopoly*.

St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional.

Where the rights given to one who has been granted a license to conduct a certain business are dependent wholly upon the terms of a statute or an ordinance, and such statute or ordinance contains a provision for revocation of the license but, neither expressly nor by fair implication, any requirement that, before such revocation, the licensee shall be entitled to a notice or to a hearing, the rights under the license may be cut off by a revocation without a notice or a hearing.

An ordinance, enacted, before the enactment of St. 1919, c. 371, by the city of Brockton, which had accepted the provisions of St. 1916, c. 293, provided that the licensing authorities might suspend or revoke any license granted for the use of a motor vehicle for hire "for violation of any law of the Commonwealth made in relation to the operation of motor vehicles, or violation of any traffic ordinance of said City . . . or violation of any of the rules, restrictions, requirements or regulations herein prescribed or for any other cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient." Licenses were granted under the provisions of the ordinance and the licensees made investments for the conduct of their business in reliance upon a continuance of their licenses. Thereafter the public trustees operating the Eastern Massachusetts Street Railway Company notified the mayor and aldermen that they proposed to discontinue certain street car lines in the city because of insufficient returns due to unfair competition by licensees under the ordinance. After public meetings and careful consideration and acting in good faith and in the exercise of a reasonable discretion, the mayor and aldermen revoked the licenses for the general convenience of the public. *Held*, that

(1) A license granted under the provisions of the ordinance might be revoked without the licensee being given notice or a hearing;

(2) The provisions of the ordinance above quoted were within the scope of the authorization of the statute;

(3) While the power to revoke a license given by the ordinance was not a power to revoke arbitrarily or irrationally, revocation under the circumstances above described was reasonable and valid;

(4) The fact that the licensees had made investments for the conduct of their business in reliance upon a continuance of their business made their licenses no less revocable under the provisions of the ordinance.

The power, given by the provisions of St. 1916, c. 293, § 1, before the enactment of St. 1919, c. 371, to such cities and towns as should accept its provisions, "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle, [with certain exceptions,]" imposes no obligation upon such municipalities to grant any licenses.

Neither the provisions of the ordinance above described nor the action of the licensing authorities in revoking the licenses granted thereunder in order that the service of the public by the trustees of the street railway company might not be discontinued contravened the principles of the common law or of the statute relating to monopolies.

PETITION, filed on December 3, 1919, for a writ of certiorari directed to the mayor and aldermen and city clerk of the city of Brockton, commanding that the proceedings and records relating to the granting and revoking of certain licenses to operate motor

vehicles for hire be certified to this court, and that such proceedings may be quashed and declared illegal; also a

BILL IN EQUITY, filed in the Supreme Judicial Court on December 3, 1919, and afterwards amended, seeking to enjoin the mayor, aldermen and city marshal of the city of Brockton from preventing the plaintiffs from operating motor vehicles for hire in accordance with a license which had been granted them under the ordinance described in the opinion.

The cases were heard together by *Carroll, J.*, who reserved them for determination by the full court, the petition for a writ of certiorari upon the petition and the certificate of the respondents and the bill in equity upon the pleadings and certain findings of fact. The material facts are stated in the opinion.

St. 1916, c. 293,* read as follows:

"Section 1. Cities and towns shall have authority to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle, except the trackless trolley vehicle, so-called, not running on tracks or rails, and may impose reasonable license fees, make regulations for the operation of such vehicles within their own limits, and impose suitable penalties for the violation of such regulations: provided, however, that no such motor vehicle shall be operated as aforesaid until the licensee of the vehicle, in addition to complying with all regulations of the city or town in which the vehicle is to be operated, shall have deposited with the treasurer of any city or town in which a license has been taken out, security by bond or otherwise, approved by the city or town treasurer, in such sum as the city or town may reasonably require, conditioned to pay any final judgment obtained against the principal named in the bond for any injury to person or property, or damage for causing the death of any person, by reason of any negligent or unlawful act on the part of the principal named in said bond, his or its agents, employees or drivers, in the use or operation of any such vehicle. Any person so injured or damaged may sue on the bond in the name of the city or town treasurer, and damages so recovered shall go to the person injured or damaged.

"Section 2. Nothing in this act shall be construed as requiring

* See St. 1919, c. 371.

the licensee to file more than one bond, which shall be filed in any city or town in which a license has been taken out.

"Section 3. This act shall take full effect in cities upon its acceptance by the city council, and in towns upon its acceptance by the voters of the town at any duly called town meeting. For the purpose of submitting this act to cities and to towns, it shall take effect upon its passage."

The cases were submitted on briefs.

O. V. Fortier, J. J. Geogan & S. Adams, for the petitioners and plaintiffs.

W. M. Wilbar, for the respondents.

RUGG, C. J. The validity of an ordinance of the city of Brockton and of action of the mayor and aldermen of that city under it are challenged in these proceedings. St. 1916, c. 293, has been accepted by the city council of the city of Brockton. Section 1 of that act authorizes cities and towns, which accept its provisions, "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with exceptions not here material, and to "make regulations for the operation of such vehicles within their own limits." Pursuant to the authority conferred by that act, in August, 1919, a comprehensive ordinance concerning the licensing and operation of such motor vehicles was adopted by the appropriate municipal board of the city of Brockton. By § 16 thereof it is provided that "The licensing authorities may suspend or revoke any license granted for the operation of such motor vehicle . . . for violation of any law of the Commonwealth made in relation to the operation of motor vehicles, or violation of any traffic ordinances of said City of Brockton or violation of any of the rules, restrictions, requirements or regulations herein prescribed or for any other cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient."

The petitioners all were duly licensed under the ordinance and began to exercise the privileges thereby granted. By the express terms of St. 1918, c. 226, § 2, each was declared to be a common carrier.

In November, 1919, the licenses granted to the petitioners and all others of like kind were revoked, not because of any violation of the licenses or of the law by the licensees, but under the final

clause of § 16 of the ordinance, for another "cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient." The reason for that action arose from these circumstances: The public trustees of the Eastern Massachusetts Street Railway Company gave notice to the mayor and aldermen of Brockton of a proposed discontinuance of certain street railway lines in Brockton because of failure to earn proper return on account of unfair competition of licensees under the ordinance. See Spec. St. 1918, c. 188, § 11. Thereupon, after general announcement had been made through the press, largely attended public meetings were held in the various wards of the city, conducted by the aldermen, to ascertain the preferences of those citizens who chose to be present, touching means of public transportation. At these meetings the matter of revoking the licenses of the so called "jitneys" was discussed. The sentiment expressed at these meetings appeared to be in favor of the retention of the street railway service. The board of aldermen, in revoking the licenses, acted in good faith and in the exercise of a reasonable discretion in the interests of the public safety and convenience as they believed, to the end that the mode of transportation which they thought best calculated to serve the entire population of the city might be preserved and maintained. The general convenience of the public was the ground of revocation of the licenses. The "jitneys," (as the motor vehicles of the petitioners are termed), could not carry all the people. The aldermen, in revoking the licenses and thereby continuing the street railway to the exclusion of the "jitneys," honestly acted according to their judgment of the public welfare.

It has been settled that the statute, pursuant to the authority of which the ordinance was passed, is valid. Regulation of the operation of vehicles for the conveyance of passengers and the requirement of a license for the use is a lawful subject for regulation by statute or by municipal ordinance. All this was decided in *Commonwealth v. Slocum*, 230 Mass. 180, 190, and cases there collected. *Commonwealth v. Theberge*, 231 Mass. 386. It now is too well settled for discussion that such limitations of the use of the highways come within the valid exercise of the police power. *Commonwealth v. Worcester*, 3 Pick. 462. *Commonwealth v. Mulhall*, 162 Mass. 496. *Brodvine v.*

Revere, 182 Mass. 598. *Commonwealth v. Kingsbury*, 199 Mass. 542.

A license such as those here in question is a mere privilege or permission and in no sense a contract or property. *Young v. Blaisdell*, 138 Mass. 344. *Lowell v. Archambault*, 189 Mass. 70. *Calder v. Kurby*, 5 Gray, 597. *Union Institution for Savings v. Boston*, 224 Mass. 286.

The petitioners claim under the ordinance. Their licenses each was subject to its terms by implication if not expressly. The ordinance does not in words provide that there shall be a hearing before revocation of a license. It was held in *Commonwealth v. Kinsley*, 133 Mass. 578, that a statute providing for revocation of a license to keep a billiard table for hire without notice or hearing was valid, and that one took his license subject to the terms of such a statute. There are numerous instances where important personal rights may be affected or settled without notice or hearing. *Palmer v. Clark*, 106 Mass. 373, 384. *Holt v. City Council of Somerville*, 127 Mass. 408, 410. *Hanley v. Aetna Ins. Co.* 215 Mass. 425, 430. *Clark v. New England Telephone & Telegraph Co.* 229 Mass. 1, 9, 10. See *Richards v. Morison*, 229 Mass. 458, 466. A hearing is so important to the decision of a question of either fact or law that ordinarily one is not concluded in his rights touching such a matter unless he clearly has agreed to abide by a determination without a hearing. *Billings v. Billings*, 110 Mass. 225. Where the rights of a licensee are wholly dependent upon the terms of a statute or ordinance, and there is provision for revocation of the license but no requirement for notice or hearing either expressly or by fair implication, then his rights to the license may be cut off by revocation without notice or hearing. The rights of a licensee can rise no higher than the terms of the statute or ordinance by which he becomes holder of the license. *People v. Department of Health*, 189 N. Y. 187, 194. *Child v. Bemus*, 17 R. I. 230.

Some of the petitioners were present when the licenses were revoked. They all were members of a voluntary association known as the Brockton Autobus Union. The secretary and business agent of that organization was present at the meeting both as a citizen and in his official capacity, and was given an opportunity to be heard. These facts are imma-

terial. The revocations were valid without notice and without hearing.

The ordinance was within the scope of the authorization of the statute. The power to revoke is not to be exercised arbitrarily or irrationally. In its primary aim, public welfare rather than the use of private property exclusively is concerned. The case is distinguishable from *Commonwealth v. Maletsky*, 203 Mass. 241, and *Kilgour v. Gratto*, 224 Mass. 78, and the numerous decisions collected in each. The ordinance cannot be pronounced irrational or unreasonable.

The grounds upon which the aldermen acted afford illustration that the ordinance in its operation may be thought to be for the public interests. Private property invested in the street railway has been in a sense devoted to a public use. It cannot be withdrawn at the pleasure of the investors. *White Co. v. Commonwealth*, 218 Mass. 558, 580; *S. C.* 246 U. S. 147, 157. It cannot be converted to other uses without great waste. Its owners cannot be required in general to operate the road at a loss. *Donham v. Public Service Commissioners*, 232 Mass. 309, 316, 317. The petitioners have been licensed to transport passengers for hire. Their investment is not by its nature so irrevocably devoted to that service as is that of the street railway. It is obvious that the situation presents a conflict of interests, where the preponderating convenience of the public to be determined by some impartial tribunal ought to govern. That is the design of the ordinance. The purpose of the aldermen in taking their action was in conformity to that design.

The petitioners have no absolute right to conduct the business of transporting passengers over the public ways. The circumstance that investments have been made in reliance upon the continuance of the licenses affords the petitioners no superior standing. They are no better off than those who have paid a heavy license fee in the hope of continuance of the privilege, and who are held to take their chances in that particular. *McGinnis v. Medway*, 176 Mass. 67. *Taber v. New Bedford*, 177 Mass. 197. *Brown v. Nahant*, 213 Mass. 271. Street railways in this Commonwealth hold their locations in public ways under a tenure no more secure than a privilege or permit subject to revocation. *Medford & Charlestown Railroad v. Somerville*, 111 Mass. 232. *Selectmen of Amesbury v. Citi-*

zens Electric Street Railway, 199 Mass. 394, 397. St. 1906, c. 463, Part III, § 66.

The power "to license and regulate the transportation of passengers for hire" conferred by § 1 of said c. 293, imposes no obligation to grant any licenses. It was said in *Attorney General v. Boston*, 142 Mass. 200, at page 203: "The power to regulate the use of the streets of a city implies the power to prohibit the use of them under certain circumstances. *Commonwealth v. Stodder*, 2 Cush. 562, 571. *Union Railway v. Mayor & Aldermen of Cambridge*, 11 Allen, 287, 294." The statute and ordinance here under review differ radically in their terms from the statute before the court in *Rea v. Aldermen of Everett*, 217 Mass. 427. The right to use public ways as a common carrier of passengers under a license is totally distinct in this respect from the exercise of a natural right or the pursuit of ordinary means of earning a living. *Gleason v. McKay*, 134 Mass. 419. *O'Keeffe v. Somerville*, 190 Mass. 110.

The street railway is of necessity to a limited extent a governmentally controlled monopoly. It is a *quasi* public corporation. It is subject to public regulation. *Attorney General v. Haverhill Gas Light Co.* 215 Mass. 394. Neither the terms of the ordinance nor the action of the respondents under it contravenes the principles of law or of the statute against monopolies.

Petition for certiorari denied.

Decree to be entered dismissing bill in equity.

JACOB RABINOWITZ vs. PEOPLE'S NATIONAL BANK.

Suffolk. January 12, 1920. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Contract, Implied. Assignment, Of chose in action. Notice.

An assignee of a right of action upon an account for goods sold, who gave no notice of the assignment to the debtor, cannot maintain an action for money had and received against one to whom his assignor, after the assignment to him, for a valid consideration assigned the same right of action and who, in good faith and without knowledge of the first assignment, in his own right as assignee received the amount of the debt from the debtor.

CONTRACT, with a declaration, as amended, in two counts, the plaintiff alleging in the first count that one I. Cohen, doing business under the firm name and style of Supreme Skirt Company, assigned to him in writing certain accounts receivable, in number thirty-six, and that thereafter the defendant collected the accounts and retained the proceeds thereof, refusing to pay them to the plaintiff. The second count was for money had and received by the defendant to the use of the plaintiff. Writ in the Municipal Court of the City of Boston dated February 15, 1918.

On removal to the Superior Court the action was tried before *Bell, J.* The material evidence is described in the opinion. At the close of the evidence, by order of the judge, the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. T. Lakson, for the plaintiff.

Lee M. Friedman, for the defendant.

CARROLL, J. On September 13, 1917, one Cohen assigned certain accounts which were then due him for goods sold, to the plaintiff as security for a loan of \$1,000, of which \$573 has been paid. No notice was given the debtors of this assignment. On October 4, 1917, Cohen assigned the same accounts to the defendant, as security for a loan which he then obtained; the defendant collected \$600 on the accounts. This action is for money had and received to recover \$427. In the Superior Court there was a directed verdict for the defendant, and the plaintiff excepted.

Although the assignment to the plaintiff was earlier in time than the one to the defendant, the plaintiff cannot recover for money had and received. There was a valid consideration for the later assignment. It does not appear that the defendant knew of the one to the plaintiff and there is no suggestion of bad faith; it did not receive the money as the plaintiff's agent or in his behalf; it was received in its own right as the assignee of the chose in action. An action for money had and received lies to recover money which should not in justice be retained by the defendant and which in equity and good conscience should be paid to the plaintiff. The right to recover does not depend upon privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense. *Clafin v. Godfrey*, 21 Pick. 1, 6. *Farmer v. Arundel*, Wm. Bl. 824.

As the money was received from the debtors by the defendant as its own, in good faith, without notice of the prior assignment, under an instrument duly executed for a good consideration and purporting to assign the accounts receivable, the plaintiff cannot recover in this action. *Cole v. Bates*, 186 Mass. 584. *Lawrence v. Batcheller*, 131 Mass. 504. *Rand v. Smallidge*, 130 Mass. 337. *Moore v. Moore*, 127 Mass. 22.

We therefore do not consider it necessary to discuss the question whether the plaintiff comes within the rule established in this Commonwealth that, as between competing assignees, assignments of a chose in action take precedence according to their dates and not according to the time when notice is given to the debtor; the earlier assignment being good against the subsequent one, though no notice is given the debtor, *Thayer v. Daniels*, 113 Mass. 129, 131, *Putnam v. Story*, 132 Mass. 205; or, within the exceptions to the rule where, by his own acts or conduct, the earlier assignee has been prevented from recovering. As bearing on this point, see *Bridge v. Connecticut Mutual Life Ins. Co.* 152 Mass. 343. Nor is it necessary to decide what rights, if any, the plaintiff has against the debtors. See *Hellen v. Boston*, 194 Mass. 579.

Exceptions overruled.

NATHAN SALLINGER vs. JOHN F. HUGHES.

Suffolk. January 13, 1920. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Poor Debtor. Jurisdiction. Words, "Final order."

The condition of a recognizance given by a judgment debtor when arrested on an execution was that the debtor, within thirty days from the date of the writ, should "deliver himself up for examination . . . and appear at the time fixed for his examination and from time to time until the same is concluded, and not depart without leave of the magistrate, . . . and abide the final order of the magistrate thereon." On a day set, the debtor appeared before the magistrate and was examined. At the close of the examination the magistrate made an order refusing the oath to the debtor and the clerk of the court prepared the certificate for the debtor's commitment and attached it to the execution. Later on the same day, the debtor's counsel called the attention of the magis-

trate to a certain statute and he thereafter, and before the execution with the certificate attached had left the custody of the court or had been handed to the officer, ordered the clerk to remove the certificate from the execution and continued the case to the next day, when, against the creditor's objection, he rescinded the order made on the preceding day and the poor debtor's oath was administered to the debtor. *Held*, that

(1) Under the circumstances, the order refusing the oath to the debtor was not a "final order;"

(2) The magistrate under the circumstances had power to reconsider his first decision and to correct an error of law;

(3) The magistrate committed no error in directing the clerk to remove from the execution the certificate of arrest and in ordering the debtor's discharge;

(4) There was no breach of the recognizance.

CONTRACT upon a recognizance given in a poor debtor proceeding by Eugene L. MacDonald as principal and John Francis Hughes as surety. Writ in the Municipal Court of the City of Boston dated September 21, 1918.

The material evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence, the plaintiff asked for the following rulings:

"1. That upon all the evidence the plaintiff is entitled to recover.

"2. All the proceedings of a magistrate after he has adjudicated on the question of the right of the debtor to take the poor debtor's oath are *coram non judice* and void.

"3. A magistrate has no authority or jurisdiction to rescind or change his decision after he has decided to refuse to administer a poor debtor's oath.

"4. An act which is *coram non judice* is an act done by a court which has no jurisdiction either over the person, the cause, or the process.

"5. If the court finds that after the magistrate's decision to refuse the oath on September 18, 1918, he did, at the debtor's request, order the certificate, which the clerk had attached to the execution and signed, to be removed from the execution, then the magistrate at the request of the debtor rendered it impossible for the arresting officer to commit the debtor and the recognizance was breached because the debtor failed to abide the final order of the court.

"6. If the magistrate does an act at the debtor's request which renders it impossible for the arresting officer to procure a

process from the court with which to commit the debtor, the recognizance, which is absolute, is not complied with by the debtor and renders his surety liable.

"7. All the acts of a debtor who has recognized under a poor debtor recognizance are done at the peril of the surety. The burden is upon the debtor to abide the final order of the court and all acts and commissions of the debtor which disable the officer to commit the debtor are done by the debtor at the peril of himself and his sureties.

"8. The debtor runs the risk of all irregularities in the proceedings whether the same arise by accident or mistake."

The judge gave the fourth, seventh and eighth, and denied the first, second, third, fifth and sixth rulings asked for, found for the defendant, and at the request of the plaintiff reported the case to the Appellate Division. The Appellate Division dismissed the report; and the plaintiff appealed.

L. Marks, for the plaintiff, submitted a brief.

J. F. Casey, for the defendant.

CARROLL, J. The defendant was the surety on a recognizance given by one MacDonald, who was arrested on an execution issued by the Municipal Court of the City of Boston in favor of the plaintiff. The condition of the recognizance was that the debtor, within thirty days from the day of arrest, should "deliver himself up for examination . . . and appear at the time fixed for his examination and from time to time until the same is concluded, and not depart without leave of the magistrate, . . . and abide the final order of the magistrate thereon." Application was seasonably made in the Municipal Court that the oath for the relief of poor debtors be administered, and an oral examination was held on September 18, 1918. In the forenoon of that day the judge made an order refusing the oath to the debtor. The clerk prepared the certificate for the debtor's commitment and attached it to the execution. Later, on the same day, the judge's attention was called by the debtor's counsel to a certain statute; whereupon, the clerk was ordered to remove the certificate from the execution and the case was adjourned to September 19, 1918; and on that day, against the creditor's objection, the order of September 18 was rescinded and the oath administered to MacDonald. The plaintiff contends that the judge had no authority to change his

decision after refusing to administer the oath, and that there was a breach of the recognizance.

The condition of the recognizance was that MacDonald should abide the final order of the magistrate. The order of September 18 was not final. It did not appear that the execution with the certificate attached was returned to the officer or left the custody of the court. There was no final order of the court until September 19, when the oath for the relief of poor debtors was administered and the debtor discharged. The court had the power to reconsider its decision and correct an error of law of its own motion or at the request of the parties. *McKinley v. Warren*, 218 Mass. 310. *Waucantuck Mills v. Magee Carpet Co.* 225 Mass. 31. This principle applies to poor debtor proceedings. There was no error of law, therefore, in directing the clerk to remove the certificate from the execution and in ordering the debtor's discharge. As the conditions of the recognizance were complied with by the debtor, the plaintiff cannot recover.

Russell v. Goodrich, 8 Allen, 150, is not at variance with this decision. In that case the final order was made, refusing the oath. The case was then adjourned to allow the debtor to secure bail. It was decided that the magistrate had no jurisdiction after his final order was made, refusing the oath to the debtor, and the debtor was not bound to attend at the time and place of the adjournment. *Fuller v. Meehan*, 118 Mass. 135, and *Goodall v. Myrick*, 111 Mass. 484, relied on by the plaintiff are to be distinguished. They are not in conflict with what is here decided. There was no error of law in refusing the plaintiff's request.

Order dismissing report affirmed.

BOARD OF SURVEY OF LEXINGTON vs. SUBURBAN LAND COMPANY.
SAME vs. SAME.

Middlesex. January 14, 1920. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Municipal Corporations, Officers and agents, Board of survey. *Way*, Public. *Equity Jurisdiction*, To enforce provisions of St. 1907, c. 191. *Equity Pleading and Practice*, Bill, Demurrer, Reservation.

A board of survey, constituted under the provisions of St. 1907, c. 191, by a town which has accepted the provisions of that statute, has no right to erect or to maintain upon unimproved land, owned by a corporation which intended to improve, develop and sell it, a sign containing a warning to purchasers as to the character of roads which, under the provisions of the statute, would be acceptable to the board.

Nor has such a board of survey any right or power conferred by the common law or by statute to erect or maintain such a sign within a highway, the fee to which is owned by a private person who has not granted such a right to the town.

If, upon the filing by a landowner of plans relative to the laying out of streets over certain land with a board of survey under the provisions of St. 1907, c. 191, the board is not satisfied with the plans, their powers and duties then are, not to reject the plans, but to alter them, determine where the streets should be located and what their widths and grades should be and, having so indicated on the plans, to approve and sign the plans as changed.

Upon a reservation for this court of a suit in equity upon the bill and a demurrer, no intendments are made in favor of the plaintiff, who should aver in the bill every material fact essential to a right to relief.

St. 1907, c. 191, does not confer upon a board of survey a right to maintain a suit in equity to restrain an owner of land from laying out and constructing streets therein because he has not complied with the provisions of the statute relating to the filing of plans with the board.

BILL IN EQUITY, filed in the Superior Court on July 19, 1919, and afterwards amended, by the selectmen of the town of Lexington, constituted its board of survey by the acceptance by the town of St. 1907, c. 191, seeking to enjoin the defendant, a corporation engaged in the business of purchasing, developing and selling real estate, "from removing, destroying, defacing, burning, or otherwise injuring or interfering with in any way" a sign, described below, erected by the plaintiff board of survey at the inside edge of the curb line of the street bordering on land owned by the defendant. Further prayers of the bill were that the plaintiffs

"be allowed to maintain said sign or a sign similar in nature, purpose and location, on or near or in the immediate vicinity of" the defendant's land; that the defendant "be forthwith ordered to return" other signs of a similar character, which had been erected by the plaintiffs and torn down and removed by the defendant, or, in case those signs had been destroyed, to pay to the plaintiffs the value thereof and all expenses incurred in their erection and maintenance "and all the loss or damage accruing from the absence of said signs;" also a

BILL IN EQUITY, filed in the Superior Court on October 31, 1919, by the same plaintiffs, seeking, upon the allegations described in the opinion, to enjoin the defendant from the construction or further construction upon its land of ways, and of sewers, drains, water pipes or street lamps in and upon ways already constructed or under construction, until the defendant "has submitted suitable plans as provided in" St. 1907, c. 191, "and until such plans are approved by the Board of Survey."

The sign described in the first suit was approximately four feet square, the top of it being eight feet from the ground. The notice thereon bore the signatures of the plaintiff board of survey, and was as follows:

"Warning.

To Purchasers of Land in Lexington.

"No road will be accepted or made a public street in Lexington nor will any water mains, street lamps, sewer or other public utilities be provided therein nor will any such street or private way be approved by the Board of Survey until such streets shall have been laid out to a width of not less than Fifty (50) feet and to a grade satisfactory to said Board.

"Chapter 191 of the Acts of 1907 has been accepted by the Town of Lexington and its provisions will be rigidly applied to all Real Estate Developments in the Town."

The defendant demurred to each bill for want of equity. The demurrers came on to be heard by *Lawton, J.*, who reserved and reported the suits upon the bills and demurrers for determination by this court, it being stipulated in each suit that the bill was to be dismissed if the demurrer should be sustained; and, if the demurrer should be overruled, that such decree was to be entered as justice and equity required.

R. L. Ryder, (N. B. Bidwell with him,) for the plaintiffs.

W. H. Wood, for the defendant.

RUGG, C. J. These are suits in equity brought by the board of survey of the town of Lexington. The bill in each suit alleges that St. 1907, c. 191, has been accepted by Lexington. The first section of that act provides that the selectmen of any town which accepts its provisions shall constitute a board of survey for that town. Section 2 is in substance as follows: "Any person or corporation desiring to lay out, locate or construct any street or way in any town which accepts the provisions of this act, . . . shall, before the beginning of such construction, submit to said board of survey suitable plans of such street or way, to be prepared in accordance with such rules and regulations as the board may prescribe." There are requirements for public hearings on such plans after notice, after which the board "may determine where such street or way shall be located, and the width and grades thereof, and shall so designate on said plans. The plans shall then be approved and signed by the board and filed" with the town clerk. Authority is conferred upon the board by § 3 to cause to be made plans of location, direction, grade and width of streets and ways, whether already laid out or not, as in its judgment are required, in accordance with general rules there set forth. It is enacted in § 4 that no way shall thereafter be laid out, located anew, altered, or widened, except in accordance with the act. And if "any person or corporation shall hereafter open for public travel any private way the location, direction, width and grades of which have not previously been approved in writing by the board of survey in the manner provided for in this act, then neither the town nor any other public authority shall place any public sewer, drain, water pipe or lamp in, or do any public work of any kind on, such private way so opened to public travel contrary to the provisions of this act: provided, however, that these provisions shall not prevent the laying of a trunk sewer, water or gas main, if it be required by engineering necessities."

The bill in the first suit alleges in substance that the defendant is a corporation organized for the purchase of vacant land and laying it out by streets and ways and the selling of lots, and in general for promoting building and settlement of people thereon, and to that end has purchased a large tract in Lexington, and that in

order to advise prospective purchasers of lots and builders of homes of the requirements of the law contained in §§ 2, 3 and 4 of the act, the board of survey have erected on or near the premises of the defendant and in the highway adjacent thereto signs containing a "Warning. To Purchasers of Land in Lexington," setting out brief statements of these requirements with reference to statutes; that the defendant is about to tear down and remove one of these signs and has already torn down and removed others of them, and intends to sell lots without complying with the requirements of said act and the rules and regulations made pursuant thereto, and without informing purchasers of the existence thereof. The prayers are for injunction to restrain the defendant from tearing down the sign, to order return of signs already removed, for authority to maintain the signs and for general relief.

It is plain that the board of survey have no right to erect and maintain upon land of the defendant signs like that here in question. Such erection and maintenance would be a plain invasion of the rights of private property without authority of law. *Diamond v. North Attleborough*, 219 Mass. 587, 591.

The only right acquired by the public by the laying out of a highway by exercise of the power of eminent domain is the easement of travel. While this includes a large variety of uses, these all relate to travel and transportation and the transmission of intelligence and other commodities. *Cheney v. Barker*, 198 Mass. 356, and cases there collected. The owner of the fee still may use it in any way not inconsistent with the paramount right of the public to use it for travel. *Como v. Worcester*, 177 Mass. 543, 548. The right of the public to establish drinking fountains, erect guideboards, and plant shade trees all are carefully authorized and regulated by statute. *Commonwealth v. Morrison*, 197 Mass. 199, 205. The erection of poles and other structures within the highway for telephone, telegraph, street railway, and electric light and power poles and wires all also are governed by statute, variations from the provisions of which are unauthorized. *Reed v. Edison Electric Illuminating Co.* 225 Mass. 163, 166. See *Lentell v. Boston & Worcester Street Railway*, 202 Mass. 115. Even the right of the abutting owner to erect obstructions within the highway often is made subject to public regulation. *Union Institution for Savings v. Boston*, 224 Mass. 286.

The plaintiffs fail to show any right in themselves to erect and maintain signs within highways. Their powers and duties under St. 1907, c. 191, afford no justification for erecting signs. Such signs have no relation to public travel. As we understand the record, all the signs were erected either on land of the defendant or within portions of the highway to which it owns or may be presumed to own the fee. If so, their acts were a direct invasion of the right of the defendant. In any event they fail to show any right to equitable relief.

The bill in the second suit sets out the adoption of rules and regulations in reference to the laying out of streets pursuant to the authority of said c. 191 by the board of survey, the filing by the defendant of a plan and petition for its allowance, and rejection of the plan and denial of the petition by the board, and that, without complying with said rules and regulations but contrary thereto and in violation of the terms of said c. 191, the defendant has begun and is continuing to construct streets and ways over its land. The prayers are for an injunction restraining the defendant from constructing streets without first complying with the rules, regulations and statute, and from placing any sewers, drains, water pipes or street lights in any street now laid out or constructed, and for general relief.

These allegations fail to show full performance of their statutory duty by the board. Their general power when plans are filed is, not to reject them, but if not satisfied with them to "alter such plans" and "determine" where the streets shall be located and "the width and grades thereof and shall so designate on said plans," and then approve and sign them as thus changed. No power is given to prevent the development of property merely because the board do not like the plans. They must not only point out their objections but indicate how the plans must be changed in order to meet their approval. The design of the statute is that, when a plan is presented by the landowner, if it is not in conformity to the statute and to reasonable rules and regulations, it shall be altered so as to be a proper plan and then, after approval, made a public record. The bill does not allege that the plans were rejected because of failure to conform to the mechanical requirements of the rules and regulations, as to kind of cloth on which made, size, scale, or other details. Since the

case is reserved on bill and demurrer, this is one of the instances where no intendments are made in favor of the pleader. It is the duty of the plaintiff to plead every material fact essential to a right to relief.

There is a broader ground upon which relief in equity must be denied. The statute here in question is an exercise of the police power restricting the freedom of use of private property. Violation of its provisions constitutes neither a public nor a private nuisance at common law. The statute contains in §§ 4 and 5 specific consequences in the nature of penalties by restricting the rights of owners in the event of violation of the statute. The consequences imposed by a statute of such a character are commonly regarded as exclusive and no general relief against violation of its terms is conferred upon public officers by implication. Such a statute, reaching out into a new domain, usually covers the whole field and states fully and exclusively the duties, obligations, powers and remedies thereby created. *Attorney General v. New York, New Haven, & Hartford Railroad*, 197 Mass. 194, 199. See *Commonwealth v. Howes*, 15 Pick. 231. Its terms are not commonly stretched beyond their plain import. Moreover, it is customary for the Legislature, in statutes of this general nature, to confer the right to relief in equity by express terms, when its purpose is that such relief shall be afforded. See, for example, R. L. c. 75, §§ 110, 120, 126, 141; c. 102, §§ 72, 95, 117, 125, 171; c. 101, § 8; St. 1914, c. 624, § 3; *Carleton v. Rugg*, 149 Mass. 550; *Watertown v. Mayo*, 109 Mass. 315; *Chase v. Proprietors of Revere House*, 232 Mass. 88; *Worcester Board of Health v. Tupper*, 210 Mass. 378; *Perry v. Hull*, 180 Mass. 547; *Hill v. McKim*, 168 Mass. 100. That rule is recognized in *Attorney General v. Williams*, 174 Mass. 476, 484. There is nothing in this case which calls for a relaxation of that rule.

In accordance with the terms of the reservations, in each case a decree may be entered dismissing the bill.

So ordered.

LYNN GAS AND ELECTRIC COMPANY *vs.* CREDITORS NATIONAL
CLEARING HOUSE.

Suffolk. January 14, 1920. — February 26, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

*Municipal Court of the City of Boston, Appellate Division. Writ of Review.
Jurisdiction.*

The right of appeal to the Superior Court from a judgment entered in the Municipal Court of the City of Boston in an action which was brought there by compulsion of law and not by election was not affected by the provisions of St. 1912, c. 649, § 2, as amended by St. 1914, c. 35, § 2; c. 409.

The jurisdiction of the Appellate Division of the Municipal Court of the City of Boston, conferred by St. 1912, c. 649, § 8, as amended by St. 1914, c. 35, § 3, extends only to actions in which there is no right of appeal to the Superior Court.

A writ of review is a new proceeding and not merely a new hearing upon an existing proceeding.

A ruling upon a matter of law by a judge of the Municipal Court of the City of Boston in a writ of review in the Municipal Court of the City of Boston is not subject to report to the Appellate Division.

WRIT OF REVIEW, issued from the Municipal Court of the City of Boston on May 16, 1917, to review a judgment of \$79.20, damages, and \$16.78, costs, entered in that court on January 26, 1917.

In the Municipal Court the judge found for the plaintiff in review and, at the request of the defendant in review, reported the case to the Appellate Division, who discharged the report "for want of jurisdiction." The defendant in review appealed.

W. H. S. Kollmyer, for the defendant in review.

H. A. Bowen, for the plaintiff in review.

RUGG, C. J. This is a writ of review brought in the Municipal Court of the City of Boston. The judgment sought to be reviewed was entered in favor of the defendant in review, who was the plaintiff in an action of contract. Upon the trial of the writ of review the judge found for the plaintiff in review and at the request of the defendant in review reported certain questions of law to the Appellate Division of the Municipal Court, where the report was discharged for want of jurisdiction on the ground that appeal

should have been taken to the Superior Court. The question presented is whether that ruling was correct.

The writ of review of necessity must be brought in the court in which the judgment to be reviewed was rendered. R. L. c. 193, § 22. *Yetten v. Conroy*, 165 Mass. 238. The plaintiff in review had no choice of court. He was compelled to resort to the Municipal Court of the City of Boston because in that court was rendered the judgment to be reviewed. It is provided by St. 1912, c. 649, § 2, as amended by St. 1914, c. 35, § 2, and c. 409, that "If, after this act takes effect, a party elects to bring in said Municipal Court of the City of Boston any action or other civil proceeding which he might have begun in the Superior Court, he shall be deemed to have waived a trial by jury and his right of appeal to the Superior Court." It is provided by § 3 of St. 1912, c. 649, that "No other party to such action shall be entitled to an appeal," but right is given to remove the case to the Superior Court for trial by jury under stated conditions. The words "such action" in this connection clearly mean the "action or other civil proceeding which" under the preceding section might at the election of the plaintiff have been brought in the Superior Court. These two sections leave unaffected the right of appeal from judgments of the Municipal Court of the City of Boston, given by R. L. c. 173, § 97, as amended by St. 1910, c. 534, § 1, in all cases where by compulsion of law and not by election the plaintiff brings his action or proceeding in the Municipal Court of the City of Boston. These two sections abolish the right of appeal from a judgment of the Municipal Court of the City of Boston to the Superior Court only as to such cases as the plaintiff might have elected to bring first in the Superior Court. They do not affect the right of appeal in other cases.

Provision is made in § 8 of the act, as amended by St. 1914, c. 35, § 3, for an appellate division of the Municipal Court of the City of Boston. In that section occur these words: "Any party to a cause brought in said court after this act takes effect, who is aggrieved by any ruling on a matter of law by a single justice, may, as of right, have the ruling reported for determination by the appellate division when the cause is otherwise ripe for judgment, or sooner by consent of the justice hearing the same." While the words of § 8, authorizing report to the Appellate Division, standing

alone, are broad enough to cover every ruling of law made by a judge, they must be read in connection with §§ 2 and 3 as amended. So read in that context they are confined to such actions as the plaintiff might have elected to bring in the Superior Court but did choose to bring in the Municipal Court of the City of Boston. The jurisdiction of the Appellate Division under § 8 extends only to cases in which there is no right of appeal to the Superior Court. That is manifest from a consideration of the general purpose of said c. 649, which is to prevent multiplicity of trials and to simplify procedure, and not to afford cumulative reviews and appeals.

The fundamental inquiry in the case at bar, therefore, is whether the writ of review is an "action or other civil proceeding" which has an independent beginning and is separate and distinct from the action in which is the judgment to be reviewed, or whether it is a step of practice in the action to be reviewed. If it is the latter, there is no right of appeal, or removal at this stage, to the Superior Court and the only remedy for the correction of errors made by a single judge is by report to the Appellate Division of the Municipal Court. *Universal Optical Corp. v. Globe Optical Co.* 228 Mass. 84. If it is the former, then it is an "action or other civil proceeding" as to the bringing of which in the Municipal Court of the City of Boston the plaintiff had no election but was under compulsion of law to institute in that court, and appeal lies to the Superior Court.

In this connection the point to be decided is whether the writ of review is a new and separate action or whether with the original action it constitutes one continuous and single proceeding. "A short statement of this singular process" known as a writ of review, as it was developed in 1811, is found in *Swett v. Sullivan*, 7 Mass. 342, at page 346, in these words: "The writ of review in civil actions is provided by statute, to correct errors in judgments rendered on verdicts, and is unknown at the common law. Either party, . . . may sue his writ of review as of right, returnable to this court, from which it must issue, to correct the errors in fact of the judgment rendered on verdict. Upon the return of the writ, the whole cause is subject to revision on the former pleadings, and no amendments can be made, or any new issues joined; and the jury may find their verdict for the original defendant, or for the original plaintiff, with greater or less damages than he recovered

at the former trial, whichever party shall sue the writ of review. By comparing the two verdicts, the error of the former verdict, if any, is apparent; and this error will be corrected by the judgment on the review." It is manifest that a process thus described is a new proceeding and not merely a new hearing upon an existing proceeding. While in appropriate instances the old judgment may be changed or modified, this does not happen in all cases and the error of the old judgment which stands unimpaired in many instances, as where the execution has been satisfied, is corrected by the judgment in the new action. In *Ely v. Forward*, 7 Mass. 25, it was held that an indorser for costs on the original writ in the action sought to be reviewed, was a competent witness upon the trial of the review. This result, in the condition of the law at that time respecting the disqualification of witnesses by reason of interest, could have been reached only on the theory that the review was a new and distinct proceeding and not a continuation of the old action. In *Thayer v. Goddard*, 19 Pick. 60, it was said that the ground of decision in *Ely v. Forward*, 7 Mass. 25, "was, that the writ of review was an original suit." It was stated by Chief Justice Shaw in *Davenport v. Holland*, 2 Cush. 1, at page 11, that "The only judgment which can be given, on a petition for review, is, that a writ of review shall or shall not be granted; and such judgment is therefore final. . . . If a writ of review is granted, it is a new process to be sued out and served like other original writs, and upon which the parties are again brought into court, and further proceedings had." Said Chief Justice Morton in *Williams v. Williams*, 133 Mass. 587, "A review is a new action, and the party who obtains in it a result more favorable to him than that of the original action is the prevailing party."

A writ of review was described by Mr. Justice Knowlton in *Clarke v. Bacall*, 171 Mass. 292, "as a separate suit." In *Johnson v. Wetherbee*, 3 Pick. 247, *Burrell v. Burrell*, 10 Mass. 221, 223, and *Yetten v. Conroy*, 165 Mass. 238, are expressions which indicate an underlying assumption that the writ of review is a suit separate and distinct from the proceeding reviewed. While a "review, under our statutes, is equivalent to a new trial after judgment" *Safford v. Knight*, 117 Mass. 281, 284, such new trial is had under a new process and not by simply reopening the previous action for further hearing.

It has been held in other jurisdictions that a writ of review is a new proceeding and not a mere continuation of the earlier action. *Badger v. Gilmore*, 37 N.H. 457. *Page v. Brewster*, 58 N.H. 126, and cases there cited. *McDonough v. Blossom*, 111 Maine, 66, 70. So far as we are aware, there are no decisions to the contrary.

It follows from these authorities that a writ of review is a new action and not a further step in the former action.

The writ of review is an action singular in its nature. Under it the powers of the court are exceedingly broad. It may enter almost any judgment required by the rights of the parties. *Fuller v. Storer*, 111 Mass. 281. Its effect may be to equalize the error in the original action, judgment in which may stand unaffected. Where execution has been issued and has been satisfied in full, manifestly the first action is conclusively ended. The only course open is to correct its errors by a new judgment.

The review must be of the original action. There may be amendments of pleadings. In some aspects the two actions may be so closely connected as to be inseparable. See *Jackson v. Gould*, 74 Maine, 564, 575. Nevertheless, the review is not a further step in the original action.

It appears to have been customary in appropriate cases to try issues of fact raised on a writ of review to a jury. *Perry v. Goodwin*, 6 Mass. 498. *Hart v. Johnson*, 7 Mass. 472. *Williams v. Hodge*, 11 Met. 266. The conclusion here reached, however, is not based in any respect upon constitutional considerations. Whether right to trial by jury is secured by fundamental law need not be considered.

The writ of review, being a new action or proceeding, was not brought in the Municipal Court by election or choice of the plaintiff but by compulsion of law, and hence was not subject to report to the Appellate Division. The remedy for correction of alleged errors was by appeal to the Superior Court.

Order discharging report for want of jurisdiction affirmed.

FRANCIS D. BOND *vs.* INHABITANTS OF BILLERICA.

MABEL H. BOND *vs.* SAME.

WILLARD F. BOND *vs.* SAME.

ALVIN F. BOND *vs.* SAME.

Norfolk. January 16, 1920. — February 27, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Way, Public: want of railing. Motor Vehicle.

In an action against a town under St. 1917, c. 344, Part IV, § 24, for personal injuries alleged to have been sustained by reason of a want of a sufficient railing upon a way approaching a bridge over a river, there was evidence tending to show that in November, 1918, at the time of the accident, the plaintiff was driving in a motor car of the type known as a "Ford touring car" upon an asphalt road; that he was on the right hand side of the road, which, after turning sharply to the left, proceeded one hundred feet to the bridge; that, after he had made the turn and when he was proceeding at the rate of about twelve or fifteen miles an hour with the left hand wheels of the motor car on the asphalt of the road, which there was narrow, the right hand wheels, at a distance of about twenty-five feet from the bridge, ran into sand and loose material which caused the car to swerve suddenly to the left; that he at once threw out the clutch and applied the brakes but was unable to stop the car within thirty or forty feet, so that it ran over the embankment into a river. *Held*, that

(1) There was evidence warranting a finding that a want of a sufficient railing upon the highway caused the injury to the plaintiff;

(2) It could not be said as a matter of law that the plaintiff's loss of control of the motor car was more than momentary.

Although a municipality is not required to erect, between a highway and an embankment bordering a river, a railing of sufficient strength to protect a motor vehicle of great weight, as compared to a horse-drawn vehicle, from going over the embankment, it *seems* that a railing might be found to be sufficient to insure the safety of ordinary travel and therefore sufficient to prevent the municipality from being liable under St. 1917, c. 344, Part IV, § 24, for injury or damage caused by want of a sufficient railing, if it was of a character to prevent a motor car of the type known in November, 1918, as a "Ford touring car" from running over the embankment where, when going at the rate of from twelve to fifteen miles an hour, the car had swerved and, with its clutch thrown out and its brakes set, had crossed the road to the embankment.

FOUR ACTIONS OF TORT, the first, second and fourth being for personal injuries received on November 16, 1918, when the plaintiffs were riding in a "Ford touring car" belonging to the plaintiff

in the third action, which ran from the Boston Road down an embankment into the Concord River in the town of Billerica. The third action is for damages to the motor car. Writs dated December 26, 1918.

The actions were tried together before *Lawton, J.* Material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor in each action. The motions were denied. The defendant then asked that the jury be instructed as follows: "The liability of the town for an injury to a traveler, occasioned by a defect or want of repair in a highway, depends upon proof that the defect itself caused the injury. If a want of due care on the part of the plaintiff, Francis D. Bond, the operator of the automobile, contributed to cause the injury, none of the plaintiffs can recover, and if without fault or negligence on the part of the plaintiff, Francis D. Bond, his automobile got beyond his control, and became wholly unmanageable, so that no care could be exercised by him in respect to it, and this condition of things was not produced by a defect in the highway, the town is not responsible for what may have happened in consequence, even if the automobile upset at a place where the highway was defective, either for want of repair in the highway itself, or for want of a suitable railing."

The requests were denied. The jury found for the plaintiff in each action: in the first action in the sum of \$1,000; in the second in the sum of \$500; in the third in the sum of \$250, and in the fourth in the sum of \$100. At the request of the defendant, the judge reported the case for determination by this court.

F. S. Harvey, for the defendant.

G. Hoague, for the plaintiffs.

CARROLL, J. The plaintiffs, while riding in a Ford automobile driven by the plaintiff Francis D. Bond, were injured on a public highway known as the Boston road in the defendant town. Near the scene of the accident the road turns sharply to the left at a point about one hundred feet from where it enters a bridge which spans the Concord River. Southerly, the highway is built up to the level of the bridge. The automobile was on the right hand side of the road and had just made the curve, when, according to the plaintiff's testimony, because of the presence of sand and

loose material in the highway, it suddenly swerved to the left, crossed the highway and went over the embankment into the river, at a point about fifteen feet southerly of the entrance to the bridge. The only cause of action relied on was the absence of a sufficient railing. The jury found for the plaintiffs. The case is before us on the refusal of the court to instruct the jury as requested by the defendant, and to direct a verdict in its favor.

The defendant contended that there was no evidence that the highway was unsafe for travel generally, and that the driver had lost control of the automobile. Cities and towns are required to keep their ways reasonably safe and convenient for travel generally, including that undertaken in automobiles as well as in horse-drawn vehicles, and if the ways are safe for travel generally, they are not obliged to make special provision to keep them safe for the passage of automobiles and other machines which were unthought of when the laws imposing the general duty of the care of highways and liabilities for the defects therein, were enacted. A railing may be found to be necessary for the safety of ordinary travel when there is a dangerous declivity near the line of travel. And from all the evidence, including the exhibits, the jury could say that the river was so close to the embankment, and the descent so dangerous, that in the exercise of reasonable diligence a railing should have been provided. *Hinckley v. Somerset*, 145 Mass. 326. *Carville v. Westford*, 163 Mass. 544, 557. *Thompson v. Boston*, 212 Mass. 211. *McMahon v. Harvard*, 213 Mass. 20.

The defendant was not obliged to erect a barrier strong enough to protect an automobile, which might be of great weight when compared with a horse-drawn vehicle, from going over the embankment. All it was required to do was to erect a railing, if a railing was found to be necessary, which would be a sufficient protection for ordinary travel, or travel generally. Cases may arise where a railing entirely adequate to the demands of ordinary travel might be found incapable of preventing a heavy motor car, moving perhaps at a high rate of speed, from going over the embankment; and a defendant would be under no liability at law to the injured occupants of such a machine. But in the case at bar, the machine was a Ford automobile. There was evidence that it was going at a rate of twelve to fifteen miles an hour, and the jury could say that a railing suitable for the safety of travel

generally, would have prevented the car and its occupants from injury. See *Doherty v. Ayer*, 197 Mass. 241; *Sawin v. Connecticut Valley Street Railway*, 213 Mass. 103, 106; *Kelleher v. Newburyport*, 227 Mass. 462.

It cannot be said as matter of law that the driver's loss of control was more than momentary. He testified that about twenty or twenty-five feet from the place where he went over the abutment, while the left wheels were in the asphalt the right wheels struck the soft dirt and loose sand; that the car began to skid and he at once threw out the clutch and applied his brakes, but could not stop his car in less than thirty or forty feet; and that the roadway was so narrow, he could not stop the car before he reached the abutment. It was for the jury, under all the circumstances shown in the evidence, to decide whether the machine was beyond the permanent restraint of the driver and that he had no control over it; or, that the loss of control was merely momentary, where, under ordinary circumstances, the power to manage the machine could be regained. *McMahon v. Harvard, supra*. *Hinckley v. Somerset, supra*.

The defendant's request was not given in words, but all that was asked for was fully covered in the judge's charge. The exceptions should be overruled; and judgments on the verdicts are to be entered for the plaintiffs.

So ordered.

LUCY J. SHUFELT vs. MICHAEL J. McCARTIN.

ARTHUR M. SHUFELT vs. SAME.

Norfolk. November 10, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL,
& JENNEY, JJ.

Motor Vehicle, Registration. Way, Public. Words, "Owner."

The provisions of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, require a registration of a motor vehicle in the name of any part owner who shall operate the vehicle by himself or by his servant.

Under the provisions of the statutes above described, registration of a motor vehicle in the name of a part owner thereof who does not operate it is insufficient

to make lawful operation of such vehicle upon a public way by a co-owner in whose name it is not registered and whose name, place of residence and address are not stated in the application for registration.

TWO ACTIONS OF TORT, the first action being for personal injuries received when the plaintiff was riding in a motor car, which was owned and operated by her husband, the plaintiff in the second action, and was run into by the defendant; and the second action being for damages to the motor car and for consequential damages resulting from the injuries received by the plaintiff in the first action. Writs dated respectively June 22 and July 5, 1917.

In the Superior Court, the actions were tried together before *McLaughlin*, J. The material evidence, certain rulings of the judge which were excepted to by the plaintiffs, and a special finding by the jury are described in the opinion. There was a verdict for the defendant in each action; and the plaintiffs alleged exceptions.

Material portions of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, read as follows: "Application for the registration of motor vehicles may be made by the owner thereof, by mail or otherwise, to the Massachusetts highway commission or any agent thereof designated for that purpose, upon blanks prepared under its authority. The application shall contain, in addition to such other particulars as may be required by the commission, a statement of the name, place of residence and address of the applicant, with a brief description of the motor vehicle, including the name of the maker, the number, if any, affixed by the maker, the character of the motor power and the amount of such motor power stated in figures of horse power; and with such application shall be deposited the proper registration fee as provided in section twenty-nine. The commission or its duly authorized agent shall then register in a book or upon suitable index cards to be kept for the purpose the motor vehicle described in the application, giving to said vehicle a distinguishing number or other mark to be known as the register number for that vehicle, and shall thereupon issue to the applicant a certificate of registration. The certificate shall contain the name, place of residence and address of the applicant and the register number or mark, and shall be in such form and contain such further information as the commission may determine. . . ."

The cases were argued at the bar for the defendant in November, 1919, before *Rugg, C. J., Braley, De Courcy, Pierce, & Jenney, JJ.*, and afterwards were submitted on briefs to all the Justices.

F. W. Campbell, for the plaintiffs, submitted a brief.

F. J. Squires, for the defendant.

PIERCE, J. These are two actions of tort by a husband and wife, for consequential and direct damages resulting from a collision on a public highway on June 16, 1917, of an automobile, owned and operated by the husband, with an automobile owned by the defendant and his sister, and operated by the defendant. There was sufficient evidence upon which the jury might properly have found that the accident resulted from the negligence of the defendant or from the negligence of the husband; the evidence also would warrant a finding that the husband and the defendant were in the exercise of due care. The car was registered in the name of the sister and was not registered in the name of the defendant. The jury as an issue of fact expressly found the defendant's sister was "the owner of an undivided interest in the car when it was registered" in her name. After "full and appropriate instructions" as to what would constitute due care and contributing negligence "to which no exception was taken," the jury found for the defendant in each case.

The plaintiffs, before the common law issues of due care and negligence were submitted to the jury, seasonably requested the judge to rule that "The automobile operated by McCartin at the time of the accident was not properly registered with the Massachusetts Highway Commission." This request was refused and the plaintiffs duly excepted. They also duly excepted to that portion of the charge wherein the jury were told "Now I instruct you that if the sister was the owner, although merely a part owner, if she was in good faith a part owner, if through the arrangement made with her brother in the purchase of it she shared in the ownership, then the fact that the car was registered solely in her name, and not in the names of both, would not affect the registration or make it illegal. That is, the car . . . would be legally registered, although it were registered in the name of one owner, if that person in whose name it was registered was in good faith a part owner." The request for the specific ruling presents the single question whether registration of a motor vehicle under St.

1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, by one part owner, is such registration under the above cited statute as permits a lawful operation of the car by the unnamed and unrecorded co-owner.

We are of opinion that the intent of the statutes require a registration of the motor vehicle in the name of any part owner who shall operate the vehicle by himself or servants; and that registration in the name of a non-operating co-owner is an insufficient registration of the vehicle and does not permit the lawful operation of that vehicle by any co-owner whose name, place of residence and address are not contained in the application for registration. This construction seems to be required by the decision of *Rolli v. Converse*, 227 Mass. 162, where at page 165 it is said: "The ruling purpose and intention of the Legislature in the enactment of the statute requiring the registration of motor vehicles in the name of the owner, and a new registration in case of transfer of ownership, was for identification in order that travellers upon the highways in case of accident might be able to fix responsibility therefor." The cases of *Downey v. Bay State Street Railway*, 225 Mass. 281, and *Hurnanen v. Nicksa*, 228 Mass. 346, are authorities for the position that a person is an "owner" as that word is used in St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, and as such, entitled to register a motor vehicle if he has a special property in the vehicle when he makes his application to the highway commission, notwithstanding the general owner may not register himself or permit registration in his name. It is plain those decisions are consistent with a construction of the statute which requires "the owner," general or special, to have registered the motor vehicle which he is operating.

In the opinion of a majority of the court the instructions excepted to were erroneous in failing to instruct the jury that the registration to be lawful should have been in the name of the part owner operating the car when the collision took place.

Exceptions sustained.

EVA ANGEVINE vs. RACHEL S. HEWITSON & another.

Suffolk. November 19, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Landlord and Tenant, Liability of landlord to member of tenant's family.
Negligence, Of one in control of real estate. *Evidence*, Competency.

The landlord of an apartment house is not liable to a child of a tenant for personal injuries caused by his falling through a defective gate into an unused dumb-waiter well around which was built a stairway used in common by the tenants of the house, if it appears that the defect in the gate existed when the tenancy began and that its existence was not known to the landlord. DE COURCY, J., dissenting.

In an action by the child, who received injuries as described above, against the landlord, evidence of regulations of the board of elevator regulations, which specifically provided that they did not relate to dumb-waiters, were held improperly to have been admitted in evidence.

TORT for personal injuries received from falling down the elevator shaft of a dumb-waiter in the back hallway of an apartment house owned and controlled by the defendants. Writ dated June 6, 1918.

In the Superior Court the action was tried before *Morton, J.* The material evidence is described in the opinion. The judge ordered a verdict for the defendants and reported the case for determination by this court, it being stipulated that judgment should be entered on the verdict if his ruling was right, and, if the case should have been submitted to the jury, judgment should be entered for the plaintiff in the sum of \$500.

W. S. Pinkham, (F. E. Litchfield with him,) for the defendants.

W. P. Murray, for the plaintiff.

PIERCE, J. This is an action of tort to recover damages for physical injuries sustained by the plaintiff on May 2, 1918, and caused by falling down a dumb-waiter well in a hallway used by tenants of the defendant Rachel S. Hewitson, the control thereof remaining in the landlord. At the close of the evidence before a jury, the presiding judge on motion ordered a verdict for the defendants, with the stipulation that final judgment is to be entered for both the defendants on the verdict if the ruling and

direction was right; but if the case should have been submitted to the jury, judgment is to be entered for the plaintiff in the sum of \$500.

The material facts in support of the plaintiff's case in substance are as follows: The house was an old house, probably forty years old; was a three-flat house, being one half of a six-apartment building. The apartment on the second floor was hired by the father of the minor plaintiff, who did not examine it before it was hired on his behalf by his wife. The family moved in on April 17, 1918, and moved out on July 1, 1918. There is a front hall and stairs and a back hall and stairs running to each of the three apartments, the back hall and stairs being used in common by all the tenants of the house. Within the stairway in the back hall, opposite the kitchen door, there was a dumb-waiter shaft with the stairs running round it. There were places for the dumb-waiter to stop at each floor. It was not in use during the tenancy of the father,—the rope was cut and it rested at the bottom of the shaft. The shaft consisted of the space between upright posts, with a removable gate running between guides on the posts at each floor. "The way of using the dumb-waiter was to lift the gate out and run the dumb-waiter up and down and then replace the gate between the guides." An inspector of the building department of the city of Boston, examined the dumb-waiter shaft on May 15, 1918. In substance he testified that the plaintiff fell from the floor to the top of the car and thence to the basement floor, twenty-two feet; that the opening at the second floor was twenty-six inches wide; that the gate was two feet and six inches high; that it was set in guides; that there was nothing to indicate that there had been any change in the elevator well or gates since the house was built; "that the gate apparently was strong and the supports were strong and no trouble with the way it was built or defect in any way."

The father of the plaintiff testified that he was a carpenter; that he did not examine the premises before hiring them and "his attention was not called to the gate at any time before the accident;" that after the accident he examined the gate, the guides and posts, and then made a sketch to a scale which was produced in court, and is before the full court on the report. In detail the sketch shows, and the witness testified, that the two posts which formed the well were three and three fourths by three and three fourths.

inches square; that they were made of hard pine and ran from the cellar to the roof, straight up and down, twenty-four inches apart measuring on the inside; that there were cleats attached to the posts which were three eighths by three fourths of an inch, nailed to the posts the three eighths way; that the tongue of the gate was three eighths of an inch from the end of the bar, and the edge of the little tongue was bevelled a little; that the gate was twenty-three and eleven sixteenths inches measured across from tenon to tenon, that is five sixteenths of an inch short of two feet, giving one sixteenth of an inch bearing against the cleat; that the gate was painted over, but was probably made of hard pine; that he measured the gate at the bottom as well as the top, and that it was square and the same width top and bottom, and that there was only one sixteenth of an inch bearing against the cleats which formed the guides; that part of this one sixteenth was taken up by the bevel; that you could just put your hand against the gate and push it in or out, either one; that the gate did not set steadily in the guides, but rattled; that there was five sixteenths of an inch play between the gate and the guides; and that there was no change in condition of the gate and dumb-waiter shaft between the beginning of tenancy and the accident.

The plaintiff testified that "she will be ten years old on the third day of July, 1919; that she lived on the second floor of the building, 59 Monadnock Street, in 1918, and was hurt on the second day of May of that year about four o'clock in the afternoon; that just before the accident she came up the back stairs with another little girl . . . and went into the apartment of her father and brought out two balls, and that she was giving one of these to Bessie when it dropped and rolled over near the elevator well, and that in picking it up she leaned against the gate and fell down the elevator well."

There was further evidence corroborating the testimony of the father, inspector and plaintiff.

Against the exception of the defendants, the presiding judge admitted in evidence subsection f of section 75, division C of the Board of Elevator Regulations, which reads: "Gates are to be made of metal or of hard wood, and are to be strong and rigid and so constructed and installed that they cannot be sprung from their guides. Bar gates hinged at one end shall be of such design

and construction as to insure their accurate closing and their rigid support when closed." The evidence should have been excluded. Section 75, subsections *a*, *b*, *c* and *d*, deals with landing gates in general and with landing gates used in connection with the special forms of elevators described in the subsections; dumb-waiter elevators are excepted in terms. And subsection *f*, which defines the form, design and construction of the gates referred to in subsections *a*, *b*, *c* and *d*, is not applicable to the form of elevator at the place of the accident.

In this Commonwealth it is settled that guests and members of the family of a lessee have no greater rights in tort against the landlord than the lessee to recover damages for injuries caused by a defective condition of the leased premises or the premises connected therewith. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357. *Bowe v. Hunking*, 135 Mass. 380. It is plain that the lessee, the father, took the premises with its hallways and stairways in the condition they were or appeared to be in at the time of the letting, unless the defects complained of were hidden, were in the nature of a trap, were known to the landlord, and were unknown to the lessee. *Cutter v. Hamlen*, 147 Mass. 471. *Martin v. Richards*, 155 Mass. 381, 386. *O'Malley v. Twenty-Five Associates*, 178 Mass. 555. There is no evidence that the landlord in fact knew that the gate was defective in the respect complained of and it is plain that he could not have informed or warned the lessee of any fact or facts in connection with the construction or adjustment of the gate that were not readily discoverable by a person of the lessee's experience and skill in carpentry. *Martin v. Richards*, *supra*, page 382. In the opinion of a majority of the court, it follows that the landlord in the case at bar owed no duty to the lessee or to the plaintiff to make the premises safer than they were at the time of letting, or to warn them or either of them of dangers which were then discoverable by the lessee.

By the terms of the stipulation, "final judgment is to be entered for both the defendants."

So ordered.

DE COURCY, J. I am unable to agree to the opinion of the majority of the court, and think it proper to express the reasons for my dissent. The plaintiff's parents on April 17, 1918, hired the apartment on the second floor of the defendants' tenement

house. The back stairs, used by all the tenants, wound around a dumb-waiter shaft or well; but the lift had been disconnected and was at the bottom of the shaft. The well consisted of the space between four upright posts. There was a painted gate at the edge of the back hall, a little less than two feet in width, constructed to run between guides attached to the posts. On May 2, 1918, the plaintiff, a child eight years of age, came from her apartment into the back hall; a ball dropped from her hand and rolled over near the dumb-waiter shaft; in picking it up she leaned against the gate, and fell with the gate to the bottom of the well, a distance of twenty-two feet. Her due care is undisputed. The main issue is whether there was evidence entitling her to go to the jury on the question of the defendants' negligence.

Admittedly this common hallway and gate were in the control of the defendants. The duty they owed to the plaintiff, who was a member of a tenant's family, was "that of due care to keep it [the gate] in such condition as it was in, or purported to be in, at the time of the letting." *Quinn v. Perham*, 151 Mass. 162, 163. This phrase was defined in *Andrews v. Williamson*, 193 Mass. 92, 94, as meaning "such condition as it would appear to be to a person of ordinary observation, and has reference to the obvious condition of things existing at the time of the letting." In the same opinion, Hammond, J., in dealing with the charge given by the judge of the Superior Court said, ". . . the fair construction of it upon this point is that, if the defect of which the plaintiffs complain was obvious at the time of the letting, then the defendant was not liable; but that if the steps appeared strong and safe at the time of the letting then the defendant was bound to use due care to keep them in the condition in which they thus appeared to be. As thus construed the charge was apt and correct." In the recent case of *Draper v. Cotting*, 231 Mass. 51, 60, the opinion quoted with approval the following language in the charge of the trial judge: "But, if the elevators were apparently safe at the time a particular tenant took occupancy, then the landlord assumed the duty of keeping the elevators not only apparently safe, but actually safe during the course of that tenant's occupancy; and it would be no defence to the landlord if as a matter of fact the elevators were defective and dangerous by reason of the landlord's negligence, to say that the elevators at the time when an accident occurred by

reason of which liability was sought to be attached to the landlord, were in the same condition at the beginning of the tenant's occupancy. If they were apparently safe when the tenant began occupancy, the landlord must use reasonable care to keep them safe; and, if they were in fact unsafe at the time when they were apparently safe, it was the landlord's duty nevertheless during the occupancy of the particular tenant to put them in a safe condition and to use reasonable care to keep them so. . . . The tenant has a right to rely on the conditions as they were apparently." Among other recent cases in which this responsibility of the landlord for the safe condition of common stairways and halls is referred to in similar language may be mentioned *Domenicis v. Fleisher*, 195 Mass. 281, 283, *Shannon v. Willard*, 201 Mass. 377, 381, *Ward v. Blouin*, 210 Mass. 140, 143, *Green v. Pearlstein*, 213 Mass. 360, 362, *Noonan v. O'Hearn*, 216 Mass. 583, 586, *Shea v. McEvoy*, 220 Mass. 239, 242, *Gallagher v. Murphy*, 221 Mass. 363, 365, *Oles v. Dubinsky*, 231 Mass. 447, 448, *Crudo v. Milton*, 233 Mass. 229, 231.

I dwell on this familiar rule because it seems to me that the opinion in effect limits the duty of the landlords to keeping the common hallway and gate in the same condition as in fact they were in at the time of the letting. But if the gate (which served as a railing or guard to the well) then appeared to be in a safe condition, when in fact it was in a defective and unsafe condition, and the hallway was thereby rendered dangerous for the use intended, it was the duty of the defendants to put and maintain the gate in that safe condition in which it purported or appeared to be. The landlords cannot escape liability by remaining in ignorance of its unsafe and defective condition. They, and not the tenant, were in control of the gate, and responsible for its condition. The duty was on them to make such examination as would disclose whether in reality it was as safe and secure as it appeared to be, and to remedy any defect that was not obvious. *Cussen v. Weeks*, 232 Mass. 563, 566. As was said in *Lindsey v. Leighton*, 150 Mass. 285, 288, "It was not necessary to show that the defendant had actual knowledge of the defect. His duty was that of due care; and ignorance of the defect was no defence." See also *Leydecker v. Brintnall*, 158 Mass. 292. And it is immaterial that the plaintiff's father was a carpenter. Manifestly any assumption of risk by him cannot be imputed to this plaintiff.

Accordingly the issue of the defendants' negligence involved only these two questions: first, would the appearance of this gate indicate to a reasonably prudent tenant that it was safe for the use for which it then was intended, — namely as a guard to protect those using the hallway from falling into the well? Second, was the gate as safe in fact as it was in appearance? As to the first, there was the testimony of Mrs. Angevine that she noticed the gate the day after she moved in, and supposed it was all right. Mrs. Jennings, a tenant, testified that as you looked at the elevator gate "it looked to be pretty . . . yes, it looked strong." And the elevator inspector, Addison, said that "the gate apparently was strong and the supports were strong and no trouble with the way it was built or defect in any way." On this evidence the jury could say that the gate was apparently safe. As to the second question, the jury could find that this appearance of safety was superficial and deceptive. The gate was so installed as to be held in place by guide strips, nailed to the posts on both sides of the opening. These strips or cleats were three eighths by three fourths of an inch in thickness. There was only one sixteenth of an inch bearing against the cleats which formed the guides, — and part of this one sixteenth was taken up by the bevel of the tongue of the gate. There was five sixteenths of an inch play between the gate and guides. The fact that the tongue of the gate extended only one sixteenth of an inch into the space between the guide cleats was not apparent, because this shortness was concealed by the cleats. As matter of fact, a slight push would cause the gate to be sprung from its position between the guides, — as happened at the time of the accident. In short, there was evidence for the jury that this apparently safe gate or barrier at the edge of the well was in fact treacherously dangerous, a trap to those using the hallway; and that this improper and unsafe condition could have been discovered and remedied before the accident by the exercise of reasonable care on the part of the defendants, who were charged with the duty of keeping this common hallway safe for their tenants.

In my opinion the case should have been submitted to the jury. *Wilcox v. Zane*, 167 Mass. 302. *Coupe v. Platt*, 172 Mass. 458. *Grella v. Lewis Wharf Co.* 211 Mass. 54. *Maionica v. Piscopo*, 217 Mass. 324. *Loucks v. Dolan*, 211 N. Y. 237. *Mesher v. Osborne*, 48 L. R. A. (N. S.) 920, note.

ADOLPH P. J. BENDSLEV vs. JOSEPH N. LOVELL & others.

Suffolk. December 2, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Contract, What constitutes, Performance and breach. *Agency*, Existence of relation. *Stockbroker. Practice, Civil*, Judgment on auditor's report. *Evidence*, Presumptions and burden of proof.

An action against a stockbroker by a customer for money had and received was referred to an auditor. Upon the filing of the auditor's report, the plaintiff moved for judgment under Rule 31 of the Superior Court (1915). The motion, by agreement of the parties, was heard upon the auditor's report without other evidence. Judgment was ordered for the defendant. *Held*, that the finding for the defendant imported a finding of all subsidiary facts essential to that conclusion.

In the action above described it appeared from the report of the auditor that the plaintiff, desiring in November to purchase, "when, as and if" issued, shares of stock in a corporation which it was proposed to issue the following July, requested an officer of a trust company to transmit the order to the defendant. This was done. The officer of the trust company knew that the stock of the corporation in question was not dealt in on the Boston stock exchange and could be bought only in New York city, where the defendant had no office, that under such circumstances the defendant's usual course of business was to transmit the order to a correspondent in New York city for execution there, and that the defendant would not himself receive a certificate for the stock until he had paid for it, that he would not carry it himself, but that he would ask his New York correspondent to carry it for him. The defendant transmitted the order to his correspondent, who accepted the order, purchased the stock when it was issued and informed the defendant thereof and the defendant then notified the plaintiff. The plaintiff did not pay for the stock at once but asked for and was given time to raise the money. He afterwards paid certain amounts on account. In the meantime, the market price fell and, the plaintiff refusing to pay more, the defendant sold the stock and applied the proceeds of the sale to the debt owed him by the plaintiff. The action was for the sums of money paid to the defendant by the plaintiff. *Held*, that

(1) A finding was warranted that the officer of the trust company was the plaintiff's agent and that the plaintiff was charged with his knowledge;

(2) A finding was warranted that the contract of the defendant with the plaintiff merely required the defendant to deal with the order of the plaintiff in his usual course of business;

(3) A finding was warranted that the defendant had fulfilled his part of the contract;

(4) The contract did not require the defendant to carry the stock on margin, but required the plaintiff to take the stock when issued and to pay for it then in full;

(5) There was not involved any question as to whether the defendant at all times had in his possession or control a sufficient number of shares of the stock to meet the demands of all his customers, or whether there was an "actual purchase or sale" of the securities, or whether the stock was within the "immediate control" of the defendant;

(6) A finding being warranted that the plaintiff had failed to show a breach of contract by the defendant, a finding for the defendant was warranted.

CONTRACT upon an account annexed containing three items entitled "money had and received," amounting to \$3,400, and one item of interest amounting to \$71.36. Writ dated May 2, 1918.

In the Superior Court, the case was referred to an auditor. Material findings of the auditor are described in the opinion. The last sentence in the report was as follows: "I find, if it is matter of fact, and rule, if it is matter of law, that upon all the evidence the defendants owe the plaintiff nothing."

After the filing of the auditor's report, the plaintiff moved under Rule 31 of the Superior Court (1915) for entry of judgment according to the report. By agreement of the parties the motion was heard solely on the auditor's report by *Wait, J.*, who ordered judgment for the defendants upon the motion and reported the case for determination by this court, it being agreed that judgment should be entered for the plaintiff in the sum of \$3,471.36 and interest if, upon the facts as found by the auditor and set forth in his report, judgment should not have been ordered for the defendants but should have been ordered for the plaintiff; otherwise, that judgment should be entered for the defendants.

Material portions of Rule 31 of the Superior Court (1915) are as follows: "On the coming in of the auditor's report, either party may move for entry of judgment according to said report; and the court, thereupon, shall order such judgment to be entered, unless, within a time stated, cause appears or is shown to the contrary. If cause appears or is shown, the court may hear the parties and frame appropriate issues for the court or jury, upon which the trial shall be had."

W. R. Bigelow, for the plaintiff.

H. F. Hurlburt, Jr., for the defendants.

DE COURCY, J. The plaintiff paid the defendants, who are stockbrokers, \$3,400 on account of the purchase of certain stock, and seeks to recover it in this action of contract. In the Superior Court the case was heard upon the auditor's report; and judg-

ment was ordered for the defendants. Under the terms of the report judgment is to be entered accordingly, unless the plaintiff was entitled to judgment as matter of law on the facts found by the auditor.

It is conceded that the plaintiff cannot recover under the gaming statute, R. L. c. 99, § 4. That an actual purchase was intended, is settled by the findings of the auditor: "Both the plaintiff and the defendants contemplated actual delivery of the stock when issued. At the time the order was given, i. e., on December 1, 1916, the plaintiff intended to pay for the stock in full when it should be issued."

It is now urged that there was a breach of contract by the defendants, for which the plaintiff can recover at common law. In determining what was the contract between the parties, as indicated by the facts found, the finding for the defendants imports a finding in their favor of all the subsidiary facts essential to that conclusion. *Adams v. Dick*, 226 Mass. 46; 52. The plaintiff in November, 1916, desired to buy one hundred shares of the Chicago, Rock Island and Pacific Railroad Company Preferred "B" stock. The stock had not been issued; but the proposed plan for the reorganization of the road contemplated its issue in the following July. Any purchase of this stock would be "when, as and if" issued, and the plaintiff so understood. He did not personally see the defendants, but requested one Coolidge, an officer of a trust company of which the plaintiff was a customer, to transmit the order to the defendants; and he did so. The stock was not dealt in upon the Boston Stock Exchange; and the defendants had no office in New York. The auditor found, "Mr. Coolidge knew that the said stock could be bought only in New York; that the defendants' usual course of business was, upon receipt of an order to buy such a stock, to transmit the order to the defendants' correspondents in New York for execution there. Mr. Coolidge also knew that the defendants would not themselves receive a certificate for the stock until they had paid for it, and that they would not carry it themselves, but would ask their New York correspondents to carry the stock for them." The facts warrant a finding that Coolidge was the plaintiff's agent, and that consequently his knowledge in connection with the business concerned was the plaintiff's knowledge. *Cobb v. Fogg*, 166 Mass. 466.

Thompson v. Brady, 182 Mass. 321. Indeed the plaintiff himself testified that "he did not expect that the defendants would buy the stock other than in the usual course of their business, that it was immaterial to him how the defendants carried the stock so long as he would get the stock, if he paid for it, and that he knew the stock was not traded in on the Boston exchange." It could be found that the defendants were justified in their understanding that "their contract with the plaintiff was not a contract which required them themselves to carry the stock which he had ordered them to buy, but was a contract to deal with his order according to the usual course of their business in dealing with orders for stocks which were bought and sold only in New York and not in Boston; that is, the defendants understood that they were required by the contract to direct their New York correspondents to buy and carry the stock for the defendants, and that when the plaintiff had paid them for the stock they would require their New York correspondents to deliver a certificate in the plaintiff's name for the one hundred shares." The defendants did transmit to their New York correspondents, Halle and Stieglitz, an order to buy the one hundred shares which the plaintiff had required, and these correspondents accepted the order. In short, it could be found that the defendants fulfilled their part of the contract actually made, and that nothing remained for them to do until the plaintiff paid for his stock.

As already stated, when the order was given, on December 1, 1916, "the plaintiff intended to pay for the stock in full when it should be issued," July 14, 1917. When the defendants were informed by their New York correspondents that the latter had bought the one hundred shares of stock, they notified the plaintiff. For the first time he called upon the defendants; but instead of paying in cash, as agreed, or giving security, as requested, he asked and was given time to raise the money. When he paid \$3,000 on August 31, 1917, the market price of the stock had fallen. He paid \$200 September 14, and \$200 October 11; but never paid nor offered to pay the full price, and never asked that the stock be delivered to him. As the market price continued to fall, and the plaintiff failed to make further payment or supply security as requested, the defendants sold the stock and sent him a statement showing that they owed him \$73.75, together with a check for that

sum. The auditor has not found, and nothing in the evidence compels the conclusion, that the original contract between the parties was changed by the notice or confirmation slip of July 14, 1917, or by the extension of time for payment. At the time of the plaintiff's default the defendants had done all they were required to do under their contract.

It is unnecessary to consider the further question argued, whether the defendants or their correspondents actually had at all times within their possession or control enough shares of stock to meet the demands of all their customers. An inquiry as to "actual purchase or sale," and as to whether the stock was within the "immediate control" of the defendants is not involved. Cases like *Fiske v. Doucette*, 206 Mass. 275, *Greene v. Corey*, 210 Mass. 536, and *Adams v. Dick*, 226 Mass. 46, relied on by the plaintiff, are not applicable to the contract made by these parties. It was not a contract to carry stock on margin, but one to take the stock when issued, and to pay in full. As already pointed out, they did not agree to purchase and carry the stock themselves. Under the contract, as the court could find, the defendants were only required to deal with the plaintiff's order according to the usual course of their business in such dealings, as above set forth. The plaintiff has failed to show a breach of that contract. In accordance with the report, the entry must be

Judgment for the defendants.



JOHN CULLITY, administrator, vs. EDWARD C. JOHNSON & others.

Suffolk. December 8, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Negligence, Employer's liability. Dumb-waiter. Elevator.

A boy eighteen years of age, who had left school at the age of twelve years, was somewhat dull and slow and within a few months had been at a home for consumptives, entered employment in a retail dry goods establishment and, thirty-two days later, was struck on the head by an ascending dumb-waiter used to carry small parcels from the second floor to the shipping department in the basement. He afterwards died from the injuries thus received. In an action by the administrator of his estate against the proprietors of the store for the

causing of his conscious suffering and death through negligence, it appeared that the dumb-waiter was a box, the bottom of which was sixteen by twelve inches, that it was operated by means of a rope running over a pulley in the top of the well on the same floor with the plaintiff's intestate, the rope at one end being attached to the box and at the other end carrying a counterweight somewhat heavier than the box, that the well was enclosed, containing an opening into it on the floor where the plaintiff's intestate was, through which he had thrust his head to signal for the elevator upon learning that an electric signal bell was not working. The details of the operation of the dumb-waiter were obvious to the casual glance. There was evidence that the dumb-waiter travelled the distance of twenty-six feet from the basement to the place where it struck the plaintiff's intestate in six and one half seconds. The elevator was not defective. *Held*, that the defendant was under no duty to warn or instruct the plaintiff's intestate as to the obvious dangers attending the use of the dumb-waiter and that the evidence did not warrant a finding of negligence on the part of the defendant.

The provisions of R. L. c. 104, § 27, relating to the construction of elevator cabs or cars used for freight or passengers and to safety appliances connected with their operation, do not apply to a dumb-waiter used in a retail dry goods establishment for carrying small parcels from the second floor to the shipping department in the basement.

TORT, with a declaration as amended in thirteen counts, for the negligent causing of the conscious suffering and death of Thomas Cullity on October 20, 1911, when he was employed by the defendants, doing business under the firm name and style, C. F. Hovey and Company. Writ dated March 8, 1912.

In the Superior Court the action was tried before *Hall, J.* The material evidence is described in the opinion. At the close of the plaintiff's evidence, the defendants rested and the judge ordered a verdict for them and, at the request of the parties, reported the case to this court for determination, it being stipulated that, if the order for the verdict was right, judgment was to be entered thereon, but if, upon all the evidence which was properly admissible and ought to have been submitted to the jury, the case ought to have gone to the jury, judgment was to be entered for the plaintiff in the sum of \$1,000.

R. L. c. 104, § 27, is as follows: "Elevator cabs or cars, whether used for freight or passengers, shall be provided with a suitable mechanical device by which they will be securely held in the event of an accident to the shipper rope or hoisting machinery, or any similar accident, and they shall be guarded and equipped with some attachment or device fastened to the elevator cab or car, elevator well, or floor of the building, which shall prevent any

person from being caught between the floor of the cab or car and the floor of the building while attempting to enter or leave the elevator. Elevators used for carrying freight shall be equipped with a suitable device which shall act as a danger signal to warn people of the approach of the elevator. Elevator wells hereafter built shall be so constructed that that part of the inside surface of the well which comes in front of the opening or door of the cab or car shall be flush with the cab or car, and the door opening from said elevator well into the building shall be placed not more than two inches back from the face of said well, so as to allow no space for a foothold between the car and well door of the building. All the above construction work and devices shall be approved by the inspectors of factories and public buildings, except that in the city of Boston they shall be approved by the building commissioner, and in other cities by the inspector of buildings; but, upon the approval of said commissioner, or inspector of buildings, or inspector of factories and public buildings, any elevator may be used without any or all of such appliances or devices if the nature of the business is such that the necessity for the same will not warrant the expense."

The case was submitted on briefs.

A. Berenson & H. U. Smith, for the plaintiff.

W. Flaherty & R. Clapp, for the defendants.

DE COURCY, J. The plaintiff's intestate, Thomas Cullity, was injured on October 20, 1911, while working in the retail dry goods establishment of the defendants. A dumb-waiter was used for carrying small parcels from the second floor of the building to the shipping department in the basement. It is described as a box, the bottom of which was sixteen by twelve inches. It was operated by means of a rope, which ran over a pulley in the top of the well, the rope at one end being attached to the box, and at the other end carrying a counterweight somewhat heavier than the box or "car." It moved in an enclosed chute or well, which extended to the ceiling of the second floor. There was an opening in the chute about three feet above the floor of the room; and the box was open on that side, where parcels were put in. The dumb-waiter rope was in plain view; and one standing near the opening could see downward into the well a distance of ten or twelve feet.

The intestate was almost eighteen years of age. He had left

school when twelve years old, and was somewhat dull and slow. From September, 1910, to June, 1911, he had been at a home for consumptives. About September 8, he went to work for the defendants, and during the last week was employed on the second floor. There was no evidence as to what work he did there. The only account of the accident comes from alleged statements made by him to his father and mother. This was, in substance, that he had a parcel to put on the "car;" that it was not at the opening; that the electric signal push button did not work; that he put his head into the well, to call for the dumb-waiter (or to pull the rope), and the car, which was coming up, struck him on the forehead and caused him to fall backward.

There was no evidence of any defect in the condition of the dumb-waiter or of the rope or pulley connected therewith. There was no hidden danger in the construction of this commonly used appliance, and the details of its operation were obvious to the casual glance. The only element of alleged danger was the speed with which the car moved, — the plaintiff's expert testifying that in its course of twenty-six feet from the basement to the second floor it took only six and one half seconds. As to the other causes of action set forth in the thirteen counts, it is enough to say that they are without support in the evidence; and manifestly the provisions of R. L. c. 104, § 27, are not applicable. Even assuming that the defendants might owe a duty to an inexperienced employee to warn him of this speed if he had occasion to put his hand within the well, they certainly did not owe the eighteen year-old intestate a legal duty to warn or instruct him not to put his head into the line of passage of the dumb-waiter when it was moving or might be expected to move toward him. Nor were they under any obligation to him to change the construction of this simple mechanism for carrying parcels. The record fails to disclose negligence on the part of the defendants.

It is unnecessary to consider whether there was any evidence for the jury of the intestate's due care. *Ramsdell v. Jordan*, 168 Mass. 505. *Hydren v. Webb*, 219 Mass. 542, 546, and cases cited.

In accordance with the report, judgment must be entered on the verdict for the defendants.

So ordered.

PETER CONDELLI vs. AMERICAN STABLES COMPANY.

CONCETTA CONDELLI vs. SAME.

Suffolk. December 10, 1919. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Negligence, In driving horse.

An officer of a corporation conducting a stable in Boston drove a horse, which had had only ten days experience in the city and had not been exercised for two days, from the stable down a runway and turned into a way or alley which ran from a school to a street and was about twenty feet in width, and upon which there were many school children of whose presence he knew. The horse bolted and the driver, seeing two children ahead of him, pulled the right rein and threw the horse off his feet, striking the children and throwing the driver from the wagon. In an action by the children for personal injuries thus caused, it was held, that the question, whether the driver, before and after the horse bolted, was in the exercise of that care required of him under the circumstances, was for the jury.

TWO ACTIONS OF TORT, for personal injuries caused by the plaintiffs being run into by a horse driven by the treasurer and general manager of the defendant, a corporation. Writs dated July 25, 1916.

In the Superior Court the actions were tried together before Quinn, J. The material evidence is described in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiffs alleged exceptions.

R. Gallagher, (J. G. Harnedy with him,) for the plaintiffs.

P. A. Hendrick, (E. D. Hassan with him,) for the defendant.

DE COURCY, J. The accident happened in Chardon Court, a way or "alley," apparently about twenty feet in width, running easterly from Chardon Street to the Baldwin School, in Boston. On the southerly side is a narrow sidewalk. On the northerly side, and near the schoolhouse end of the court, is the door of the runway leading to the floor of the defendant's stable. The plaintiffs were going home from school, on the afternoon of Monday, October 5, 1914, and were about halfway from the schoolhouse to Chardon Street, when they were struck by a horse of the defend-

ant, which was being driven by one Heald, the general manager of the stables company.

On the evidence most favorable to the plaintiffs it could be found that these were the facts: This was a green horse, with only ten days experience in the city, and had not been exercised on Sunday or Monday. It had been hitched, and left standing for five or ten minutes, about forty-five feet from the door. Heald entered the stable from Chardon Court, where there were then many school children. He got on the wagon, and as he drove out, the horse bolted. The driver turned to the right into Chardon Court, and, seeing the plaintiffs about twenty feet ahead, he pulled the right rein and threw the horse off its feet. Heald was thrown from the wagon, and the horse was later caught on Chardon Street.

The plaintiffs did not allege that this was a vicious or unmanageable horse, and known by the defendant to be so; and cases like *Palmer v. Coyle*, 187 Mass. 136, and *Scanlon v. Cavanaugh*, 210 Mass. 291, are not applicable. Nor could it be ruled that it was a runaway horse, escaping from control through no neglect of the driver; because Heald testified that he "had control of the horse up to the time [he] threw him." See 17 Ann. Cas. 812 note. The contention of the plaintiffs is that Heald was negligent in driving this green horse, somewhat frisky from lack of exercise, into Chardon Court in the manner he did, and when children were there, unaware of his coming.

On the evidence the case is close. But on the whole we think it was a question of fact for the jury whether he should have undertaken to drive this horse through the court at that time, whether the horse in fact got beyond the driver's control, and in short whether the conduct of Heald, before and after the horse bolted, was such as the standard of due care required him to exercise in the circumstances. *Keaveny v. Moran*, 208 Mass. 277. *Raymond Syndicate v. American Express Co.* 215 Mass. 140.

Exceptions sustained.

LEON GINZ & another vs. MAX AXELROD.

Suffolk. January 5, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Contract, Modification, Performance and breach.

After an acceptance of an order for the purchase of goods upon thirty days' credit, to be delivered in August and September, the purchaser wrote to the seller, "Send those goods on July 10th or as much of same as you can," to which the seller replied, "I shall do my utmost to have the goods shipped at that time." On July 22, in reply to a letter from the purchaser urging immediate delivery, the seller wrote that he had the goods ready for delivery but that he would not make delivery upon thirty days' credit but must be paid in advance of delivery. A judge who heard an action by the purchaser against the seller for damages resulting from breach of the contract as modified, found that the time of delivery had been changed by mutual agreement and found for the plaintiff. *Held*, that the findings were warranted.

CONTRACT, with a declaration as amended upon an order of the plaintiffs to the defendant on March 29, 1918, for velour to be sold on thirty days' credit and delivered, one half in the following August and one half in September, which order, after acceptance by the defendant, was alleged to have been modified by mutual agreement to provide for delivery on July 10, 1918. Writ in the Municipal Court of the City of Boston dated November 6, 1918.

The material evidence at the trial in the Municipal Court, findings of the judge and the only one of several questions of law there raised and relied on in this court, are described in the opinion. The judge found for the plaintiffs in the sum of \$823.50, and at the defendant's request reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

The case was submitted on briefs.

H. A. Mintz, for the defendant.

H. A. Eyges, for the plaintiffs.

JENNEY, J. It is conceded that on March 29, 1918, a contract was made whereby the defendant agreed to sell and the plaintiffs agreed to purchase on thirty days' credit certain pieces of velour, part of which was to be delivered in August and the remainder in September of that year. The sole controversy is whether the

time of delivery was subsequently modified by letter, the plaintiffs founding their right to maintain the action on the contention that the contract was so varied by the parties as to require delivery of all the cloth in July, and on the further contention that the defendant failed to make delivery as required by the modified contract. The defendant contends that the contract never was changed. He raises no question of variance between the declaration as amended and the evidence.

The material parts of the correspondence are as follows: May 14, 1918, (plaintiffs to defendant) "I want to change the shipping instructions on order #593 of March 29th. Send those goods on July 10th or as much of same as you can." May 17, 1918, (defendant to plaintiffs) "I have received your letter of the 14th inst. and have made note to send your goods on date requested. I shall do my utmost to have the goods shipped at that time." July 18, 1918, (plaintiffs to defendant) "We wrote you some time ago to ship the goods which we ordered from you on March 20th, on July 10th. As we have received no invoice from you up to this writing we will ask you to kindly give this matter your attention and ship our goods to us at once and oblige." July 22, 1918, (defendant to plaintiffs) "With reference to your order for velour coatings, want to advise that I have these goods ready for delivery, and if you will send me a check to cover this invoice, will make shipment immediately. . . . Your copy of order, on these goods, reads Net 30 Days, but am not in a position to give these terms at present, you may, therefore, deduct the interest for the unexpired time at the rate of 6% per annum. Shall expect to hear from you at once." July 23, 1918, (plaintiffs to defendant) "Your letter of the 22nd inst., is totally at variance with the terms of your acceptance of our order which is Net 30 days and not cash either before or on delivery. You admit in your letter that you have the goods which we bought from you on hand and ready for delivery and in view of this admission we are entitled to the delivery of this goods without further delay or conditions pursuant to the terms of the order and we hereby call upon you to make such delivery. This is the final position we take under our contract with you for the protection of our rights. Please ship goods by express and send us invoice by return mail. In as much as you have the goods now on hand you are in a position

to ship same to us immediately. Unless you ship these goods to us on or before the 27th inst. we will purchase identical or similar goods in the open market and hold you liable for the difference between the price paid and the contract." July 25, 1918, (defendant to plaintiffs) "Your letter of the 23rd received. I have nothing further to add than already advised in my recent letter. I do not care at this time to extend any credit to your concern for reasons which I do not care at this time to state. If I do not hear from you very shortly, shall assume that you do not wish to have this goods, and will be obliged to dispose of them." August 6, 1918, (defendant to one of the plaintiffs) "Have not as yet received your check for goods that I am holding for you. If I do not hear from you by Saturday, August 10th, will take it for granted that you do not care to have these goods and will dispose of them elsewhere."

The defendant does not dispute the elementary proposition that the contract could be modified by mutual agreement, but urges that no finding of such change was justified by the evidence, because the minds of the parties never met as to the proposed variation in the time of delivery.

The trial judge found that the time of delivery had been changed by mutual agreement. In effect the defendant conceded by his letters that the modification was in existence, that he was ready and willing to ship the goods, that he refused to do so only because the plaintiffs were unwilling to pay therefor before delivery, and that said refusal was solely because he was, using his own language, "not in a position to give [the plaintiffs] these terms [thirty days' credit] at present" and did not wish to give any credit for reasons he did not "care . . . to state." The plaintiffs rightfully refused to pay for the goods before delivery, and they never were delivered. This action was brought November 6, 1918, to recover damages sustained by the failure of the defendant to perform the contract as modified, and the judge of the Municipal Court of the City of Boston before whom the case was tried found for the plaintiffs, and the Appellate Division of the court upheld his finding and dismissed the report. The finding was justified by the evidence. *Bristol Manuf. Corp. v. Arkwright Mills*, 213 Mass. 172. *Gouzoulas v. F. W. Stock & Sons*, 223 Mass. 537.

While there were numerous requests for rulings, none have

been argued except those involving the question here considered, and all others are treated as waived. The order dismissing the report must be affirmed.

So ordered.

MARIA BELLINGHERI vs. MARIA DE LUCA ALIOSI.

Suffolk. January 12, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Slander. Evidence, Presumptions and burden of proof.

In the declaration in an action of tort for slander, the plaintiff alleged that the defendant "in the Italian language" called her "buttana," which in the English language meant a whore. The plaintiff's evidence tended to show that the word was used in the presence of others who understood its meaning and that it was in the Sicilian dialect. There was a finding for the plaintiff. *Held*, that the finding was warranted.

TORT for slander, the plaintiff alleging in substance that the defendant stated "of the plaintiff in the Italian language substantially as follows: 'Maria Bellingherie e buttana' (meaning in the English language that 'Maria Bellingheri is a whore')." Writ in the Municipal Court of the City of Boston dated September 3, 1918.

The material evidence at the trial in the Municipal Court is described in the opinion. At the close of the evidence, the defendant asked the judge to rule that, (1) on all the evidence the defendant was entitled to a finding, and that (2) a finding for the plaintiff could not be made on the evidence.

The rulings were refused. The judge found for the plaintiff in the sum of \$50, and, at the request of the defendant, reported the case to the Appellate Division, who denied the report. The defendant appealed.

F. M. Zottoli, for the defendant, submitted a brief.

J. A. Vitelli, for the plaintiff.

DE COURCY, J. In this action for speaking slanderous words in Italian concerning the plaintiff, the declaration properly set out the words as spoken in the foreign language and also their meaning in English. *Romano v. De Vito*, 191 Mass. 457. There

was evidence that the defendant called the plaintiff "Maria Bellingherie e buttana;" that "buttana" is a word in the Sicilian dialect meaning "whore" in English; and that it was spoken in the presence of others who understood its meaning.

The evidence on behalf of the defendant was that she called the plaintiff a "banniana;" meaning, in a Sicilian dialect, "either a she Town Crier or a she Hawker." Apparently this was the only defence relied upon. It was a question for the trial judge to decide what words were used by the defendant, and what meaning they naturally conveyed to the understanding of the persons in whose presence they were uttered. In finding for the plaintiff he necessarily decided this and all the other issues of fact in her favor. *Downs v. Hawley*, 112 Mass. 237. *Miller v. Parish*, 8 Pick. 384. *Kenney v. McLaughlin*, 5 Gray, 3. See *Whiting v. Smith*, 13 Pick. 364; *Rutherford v. Paddock*, 180 Mass. 289; 15 Ann. Cas. 1242 note.

Order dismissing report affirmed.

JONAS H. VAUGHAN vs. WILLIAM P. MANSFIELD.

Middlesex. January 12, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Contract, Implied. Physician. Husband and Wife. Agency, Existence of relation. Practice, Civil, Requests and rulings.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. At the trial above described, the defendant asked for, and the judge refused to give, a ruling that "the husband is not liable for necessities furnished to the wife unless they were either furnished with his knowledge and consent that he be responsible for them, or unless he neglects and refuses to furnish them himself." *Held*, that the refusal to give the ruling was right, because it omitted all reference to the authority of the wife arising from the marital relation or inferable from the evidence.

At the same trial, the defendant asked for, and the judge refused to give, a ruling that if "the husband furnishes the wife with sufficient means or money to

provide her with what is reasonably necessary for her support and comfort, then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts." *Held*, that the refusal of the ruling was right, because it did not include any statement as to the effect upon the liability of the husband of knowledge on his part that the plaintiff's services were being rendered to the wife, or as to the right of the wife to contract for the services.

The defendant also, at the trial above described, asked for a ruling that the "burden of proof is on the plaintiff to show that the defendant neglected or refused to provide his wife with the necessities before the plaintiff can recover." The ruling was refused. *Held*, that the refusal was proper, because the ruling requested ignored the question of authority of the wife to contract for the services.

CONTRACT for a balance of \$116.06, alleged to be due upon an account annexed for services as a physician. Writ in the First District Court of Eastern Middlesex dated October 24, 1913.

On appeal to the Superior Court, the action was tried before *Aiken*, C. J. The plaintiff testified in substance that he made the professional visits at the defendant's house described in the account annexed to his declaration; that he was unable to distinguish what visits were for the purpose of treating the defendant's wife, their child, or the defendant himself; that he had been called by the defendant's wife on many occasions; that on some of the occasions the defendant himself personally had called him to attend to the defendant's wife, and that in July, 1908, he had received a payment of \$5 from the wife of the defendant on this account.

The defendant testified in substance that he did not authorize his wife to contract a bill with the plaintiff; that he had instructed his wife never to run any bills; that he gave her on an average of \$25 weekly to pay all expenses and that she would tell him from time to time when she needed money and he would give it to her then, or later on, if he did not have it at the time of asking; that he had no recollection of ever calling the plaintiff to attend his wife or child, and that he had never been ill himself or consulted the plaintiff professionally.

At the close of the evidence the defendant asked for the following rulings:

"1. That upon all the evidence in this case the plaintiff can not recover.

"2. That the husband is not liable for necessities furnished to the wife unless they were either furnished with his knowledge and

consent that he be responsible for them, or unless he neglects and refuses to furnish them himself.

"3. If the husband furnishes the wife with sufficient means or money to provide her with what is reasonably necessary for her support and comfort then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts."

"8. The burden of proof is on the plaintiff to show that the defendant neglected or refused to provide his wife with the necessities before the plaintiff can recover."

The rulings were refused. The jury found for the plaintiff in the sum of \$62.03; and the defendant alleged exceptions.

C. H. Stebbins, for the defendant.

E. E. Spear, for the plaintiff.

JENNEY, J. In this action, it already has been decided on evidence substantially as set forth in the bill of exceptions, that there was, or could be found to be, authority in the wife of the defendant to contract on his credit for the medical services under controversy. *Vaughan v. Mansfield*, 229 Mass. 352. That decision is decisive of the exception to the refusal to give the defendant's first request, which is considered although Rule 45 of the Superior Court was not complied with.

The remaining requests were properly refused. The second omitted all reference to the authority of the wife arising from the marital relation, or inferable from the evidence, and therefore was erroneous. *Alley v. Winn*, 134 Mass. 77. *Lamson v. Varnum*, 171 Mass. 237. *Auringer v. Cochrane*, 225 Mass. 273. The third was objectionable because it did not include any statement as to the effect of knowledge on the part of the husband, or as to the right of the wife to contract for the services. *Vaughan v. Mansfield*, *supra*. The remaining request as to the burden of proof was improper because it wholly ignored the question of the wife's authority, and required an instruction that the plaintiff could not recover except upon the neglect or refusal of the defendant to provide necessary medical services.

Exceptions overruled.

MABEL HEALY, guardian, vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. January 13, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, In use of highway. Practice, Civil, Parties. Insane Person.

A woman about sixty-five years of age in December, 1916, in crossing a street in a city containing double tracks of a street railway, with which she was familiar, stopped at the curb and looked both ways to see if a street car was approaching. At that time a car, apparently on the farther track, was three hundred feet distant. There were other vehicles going back and forth. The nearer rail of the first track was eighteen feet, and the nearer rail of the farther track was twenty-seven feet from the curb. The woman proceeded slowly on a crosswalk and, when she reached the first rail, she again looked both ways. The car then was about one hundred and fifty feet distant and was approaching at the rate of six or seven miles an hour. It was customary to run cars slowly in that vicinity. The speed of the car then was increased and the woman was run into on the farther track, the car then going from fifteen to seventeen miles an hour. It ran one hundred feet beyond the place of the collision before it was brought to a stop by an air brake. In an action of tort for damages resulting to the woman from the collision, it was *held*, that upon the foregoing facts the question, whether she was exercising reasonable care for her safety, was for the jury.

In an action of tort for personal injuries suffered by a person under guardianship as an insane person, brought in the name of the guardian, it was *said* that the action should have been brought in the name of the insane person by her next friend, and not in the name of the guardian; but, no objection having been raised by the defendant, this court treated the action as duly brought in the name of the insane person by her guardian.

TORT for personal injuries received by Annie Middleton on December 1, 1916, when she was run into by an electric street car of the defendant on Chelsea Street in that part of Boston known as East Boston. Writ dated January 15, 1917.

On January 11, 1917, Annie Middleton was adjudged insane and Mabel Healy was appointed her guardian. The plaintiff is described in the writ as follows: "Mabel Healy, who brings this action on behalf of her ward Annie L. Middleton an insane person."

In the Superior Court the action was tried before *Raymond, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. There was a verdict for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions.

J. E. Hannigan, for the defendant.

T. F. McAnarney, (*J. A. Lyons* with him,) for the plaintiff.

DE COURCY, J. Annie Middleton, (now under guardianship as an insane person,) referred to hereafter as the plaintiff, was injured by a car of the defendant while she was crossing Chelsea Street, East Boston, between five and six o'clock in the afternoon of December 1, 1916. This action was brought to recover damages for the personal injuries suffered by her; and the trial in the Superior Court resulted in a verdict in her favor. At the argument in this court counsel for the defendant waived all the exceptions taken at the trial, except that to the judge's refusal to grant the motion that a verdict be ordered for the defendant; and he also frankly conceded that there was evidence of negligence on the part of the motorman. The only question now presented is whether there was evidence to warrant the submission to the jury of the issue of the plaintiff's due care.

At the place where the accident occurred the defendant maintains a double set of tracks in Chelsea Street, the southerly, or outbound, track for cars running from Boston to Chelsea and Orient Heights, and the northerly, or inbound, track for cars going to Boston. The street is approximately fifty feet in width. From the southerly sidewalk to the nearer rail of the outbound track the distance is about eighteen feet; and to the nearer rail of the inbound track (where the plaintiff was injured) about twenty-seven feet. At the trial there was no witness produced who saw the actual collision. The plaintiff was unable to testify. The motorman was in France. Taking the view of the evidence most favorable to the plaintiff the jury could find the facts to be as follows:

Annie Middleton was about sixty-five years of age and an old resident of East Boston. She was returning home, after her day's work in South Boston, and was obliged to cross Chelsea Street. According to the testimony of the witness Maguire, she stopped at the curbstone on the southerly side of Chelsea Street, and before

stepping on the crosswalk near O'Connell's store she looked both ways. The car, as variously stated, was then "a little past" Shelby Street, or at a crosswalk near the junction of Chelsea and Saratoga streets, or "coming around the curve," and apparently was about three hundred feet from her. There were other vehicles going back and forth. The plaintiff proceeded slowly upon the crosswalk, and when she reached the nearest rail she again looked both ways. The car was then about one hundred and fifty feet distant, and was approaching at a rate of six or seven miles an hour. Although it was customary for cars to run slowly in this vicinity, the speed of this one was increased, and at the time of the accident it was moving from fifteen to seventeen miles an hour; and it ran about one hundred feet beyond the place of the accident before it was brought to a stop by means of the air brake.

In our opinion it was for the jury to decide, as a practical question of fact, whether the plaintiff exercised reasonable care for her safety in attempting to cross the street when she did, and in her conduct after she left the sidewalk. *O'Toole v. Boston Elevated Railway*, 211 Mass. 517, and cases cited. *Shea v. Boston Elevated Railway*, 217 Mass. 163. This is especially so in view of St. 1914, c. 553, which supplies a presumption of due care in her favor, and places upon the defendant the burden of proving contributory negligence on her part. All the facts surrounding the accident are not in evidence, owing to the disability of the plaintiff and the absence of the motorman. There is no testimony as to the conduct of the plaintiff just before and at the time she was injured. It is peculiarly a case where this remedial statute is applicable. *Mercier v. Union Street Railway*, 230 Mass. 397, 403. *Creedon v. Galvin*, 226 Mass. 140. *Gagnon v. Worcester Consolidated Street Railway*, 231 Mass. 160. *Burns v. Oliver Whyte Co. Inc.* 231 Mass. 519.

It is to be noted that the action should have been brought in the name of Annie Middleton, and not in the name of the guardian; but, as no objection was made on that score, we have considered the case as if duly brought in her name by her guardian. *Neafsey v. Chincholo*, 225 Mass. 12, 14.

Exceptions overruled.

FRED H. BURDETT vs. DAVID I. WALSH & others, receivers.

Suffolk. January 13, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Bond. Surety. Contract, Performance and breach. Evidence, Relevancy. Waiver.

The owner of shares of the capital stock of a corporation sold them to one who agreed in writing to give in part payment his note "secured to the satisfaction of" the seller. Later the purchaser and a surety company executed a bond, which recited that the seller had required that the purchaser should give him a bond to indemnify him "in the event of the failure" of the purchaser "to pay the aforesaid note in accordance with his agreement," and which was conditioned upon the purchaser paying to the seller "the principal of the aforesaid note and interest thereon in accordance with the aforesaid agreement or with the terms of said note." No note ever was executed or delivered, and the amount mentioned in the agreement was not paid to the seller. In an action by him against the purchaser and the surety upon the bond, it was *held*, that the existence of the note was a prerequisite to the liability of the surety.

At the trial of the action above described, the plaintiff, to show a waiver by the surety company of its defence arising from the lack of a note, offered evidence tending to show that the surety company, after it had received notice that no note had been given by the purchaser to the seller, requested payment of premiums upon the bond. The evidence was excluded and the plaintiff alleged an exception, which he did not argue in this court; and it was *held* that the exception, not having been argued, was treated as waived; and it also was *stated* that the evidence properly was excluded because it did not tend to show a waiver by the company.

CONTRACT against the administrator of the estate of the principal, and the receivers of a corporation which was a surety upon the bond described in the opinion. Writ dated March 11, 1918.

In the Superior Court the action was tried before *Hitchcock, J.* The administrator of the estate of the principal obligor was defaulted and the trial proceeded against the receivers of the surety. The material evidence is described in the opinion. At the close of the evidence, by order of the judge, the jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

The case was submitted on briefs.

J. E. Young, for the plaintiff.

R. H. Willard & L. R. Wentworth, for the defendants.

JENNEY, J. This is an action of contract, against the administrators of the estate of Stephen Jennings and the receivers of the New England Casualty Company, on a bond given by Jennings as principal and the company as surety.

On February 9, 1914, Jennings made a contract in writing with the plaintiff whereby, in addition to the purchase of certain real estate, he agreed to buy from the plaintiff stock in the Record Dry Plate Company for \$3,200, "payable" \$200 in cash and the balance by "Note of Three thousand dollars (\$3,000.00) in one year with interest at six per cent (6%) secured to the satisfaction" of the plaintiff. The \$200 were paid, the stock was transferred and all the other terms of the contract except that relating to the payment of the \$3,000 were performed. On March 9, 1914, pursuant to the contract, Jennings as principal and the company as surety executed and delivered to the plaintiff a bond in the penal sum of \$3,000, which bond, after reciting the agreement between the plaintiff and Jennings, a copy of which was annexed to it, further recited: "Whereas, the said Fred H. Burdett has required that the said Stephen Jennings should give him a bond to indemnify him in the event of the failure of the said Stephen Jennings to pay the aforesaid note in accordance with his agreement." Its obligation was as follows: "Now, therefore, if the said Stephen Jennings, his heirs, executors, administrators or assigns shall pay to the said Fred H. Burdett, his heirs, executors, administrators or assigns, the principal of the aforesaid note and interest thereon in accordance with the aforesaid agreement or with the terms of said note, then this obligation to be void, otherwise to remain in full force and effect." No note, however, was ever given by Jennings to the plaintiff and the \$3,000 have not been paid in whole or in part.

The recitals considered by themselves clearly import an obligation to pay a note, and the bond, instead of providing for the payment of the amount of the indebtedness under the agreement, bound the parties thereto to pay the principal of the note and interest. We think that the existence of a note as provided for in the agreement and clearly recognized by the recitals and the obligation of the bond was a prerequisite to the liability of the surety. The provision that the payment of the principal of the note was to be in accordance with the agreement does not enlarge

the liability, as it refers to and identifies the note. The alternative provision as to payment in accordance "with the terms" of the note, clearly cannot import liability where no note in fact has been given. The fact that the amount payable is precisely the same as if the note had been given, cannot make the surety liable for the reason that the liability that it assumed and contracted to meet arose only in case Jennings failed to pay the sum due under the note provided for. A note is not in legal effect the same as an ordinary contractual obligation to pay the amount named therein, even if unnegotiable. *Gay v. Rooke*, 151 Mass. 115. *Commonwealth v. Dow*, 217 Mass. 473, 479.

The surety had a right to define and to limit its liability even although it resulted in the failure of the obligee to get the security that he intended to obtain and thought that he had procured. Liability cannot be founded except upon the reasonable import of all the terms of a bond, otherwise a surety would be held not on the contract as actually made, but on that which the court might determine that he intended to enter into. It is not sufficient that he "sustain no injury by a change in the contract, or that it may even be for his benefit." *Miller v. Stewart*, 9 Wheat. 680, 703. *United States v. Boecker*, 21 Wall. 652, 657. The decisions, in cases where bonds have been given by a corporation organized for the express purpose of giving security, under which the rule so often declared as to the strictness with which bonds should be construed has been somewhat relaxed, do not aid the plaintiff. Such decisions are inapplicable where liability is beyond the scope of the undertaking. See *Guaranty Co. v. Pressed Brick Co.* 191 U. S. 416, 426; *Hill v. American Surety Co. of New York*, 200 U. S. 197, and cases cited in Ann. Cas. 1912 B 1087.

The plaintiff has not argued his exception to the refusal of the judge to admit evidence tending to show that the company, after it had notice that no note had been given, requested the payment of premiums on the bond, which evidence was offered as tending to show a waiver on the part of the company. This exception is treated as waived. Even if not so considered, the evidence was properly rejected. Waiver is the intentional relinquishment of a known right, and it cannot be based on this evidence of insistence on rights under the contract. The bond was valid, the question at

issue being only whether liability had arisen under its terms. See *McGrath v. Quinn*, 218 Mass. 27.

The verdict for the defendants rightly was ordered, and the plaintiff's exceptions must be overruled.

So ordered.

PEOPLES EXPRESS, INCORPORATED, vs. FREDERICK J. QUINN
& others.

Suffolk. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Equity Jurisdiction, To enjoin interference by lessor with lessee's possession, Plaintiff must come into court with clean hands. *Landlord and Tenant*, Peaceful possession. *Estoppel*. *Frauds, Statute of*.

An express company, which was the lessee of a portion of a building under a lease in writing for five years, made a sublease of a part thereof with the consent of the lessor. Less than a year after the lease was given, the lessor, desiring to tear down the building occupied by the lessee and his subtenant and to erect a new building on its site, orally agreed with the lessee and the subtenant that they should surrender possession of the leased premises and that the lessor should provide for them rent free other premises in which to carry on their respective businesses until the new building should be ready for occupancy, should pay all their moving expenses, and, when the new building was completed, should give to them a lease of a portion thereof for the unexpired term of their leases and at the same rental. The lessee and sublessee visited the new premises offered by the lessor and orally agreed to accept them. Thereafter, in reliance upon such oral agreements, the lessor hired the new premises for temporary occupancy by the lessee and sublessee, made a contract for the excavation and mason work for the new building, executed to a third party a lease of a part of the building to be erected, which included a part of the premises described in the plaintiff's lease, advertised the structures then upon the premises for sale and sold them. The contractor began work and was excavating in the rear of the leased premises when the lessee forbade him and brought a suit in equity to enjoin the lessor from further operations. The sublessee stood by his oral agreement although urged by the lessee to repudiate it because it was not in writing. Besides evidence of the foregoing facts, there was evidence warranting a finding that the lessee intentionally refrained from putting his agreement into writing, intending to take advantage of that fact later. A decree was entered dismissing the bill. *Held*, without determining whether there had been a surrender of the premises by the lessee, that the decree was well warranted, because the facts warranted findings, that the plaintiff had estopped himself from relying on the fact that his agreement was not in writing and that the granting of an injunction would operate inequitably.

BILL IN EQUITY, filed in the Superior Court on March 31, 1919, to enjoin the defendants, owners and lessors of a building occupied in part by the plaintiff as lessee, from tearing down the leased premises.

In the Superior Court, the suit was heard by *Jenney, J.*, a commissioner having been appointed under Equity Rule 35 to take the evidence. Material facts found by the judge are described in the opinion. By order of the judge, a decree was entered dismissing the bill with costs. The plaintiff appealed.

J. H. Duffy, for the plaintiff.

N. N. Jones, for the defendants.

DE COURCY, J. The plaintiff, as lessee, seeks by this bill in equity to restrain the defendants, who are the lessors and owners, from doing certain acts in the process of tearing down a building in which the leased premises are situated. The following material facts were found by the trial judge.

The defendants, copartners under the name of Amesbury Associates, executed and delivered to the plaintiff a lease of a store and room overhead, a portion of a building numbered 4 Market Square in Amesbury, for five years from October 1, 1918. The plaintiff sublet a portion of the premises to one Sam Levine, with the consent of the defendants. In March, 1919, the associates desired to erect a new brick building on the site of the leased premises and of adjoining land owned by them, and had plans prepared for that purpose. They had interviews with Levine and one McCarthy (who was duly authorized to act for the plaintiff); and it was orally agreed by all the parties, in substance, as follows: The plaintiff and Levine should surrender possession of the leased premises; the defendants should provide for them, free of rent, until the new building was ready for occupation, a store in which to carry on their business, and bear all the expense of moving their goods and effects to the new location; and they should give the plaintiff and Levine a lease of a store in the contemplated building for a time as long as the remainder of their present term, and at the same rental. McCarthy and Levine visited the store which was to be provided for their use during the construction of the new building, and agreed to accept the same.

After said oral agreement was made, and in reliance thereon, the defendants hired the store for the temporary occupancy of the

plaintiff and Levine; entered into a contract with one Watkins in the sum of \$4,450 for the excavation and mason work required for the new structure; and executed a lease to the F. W. Woolworth Company of premises constituting part of the building to be erected and comprising a portion of the location described in the present lease of the plaintiff. They advertised the old houses for sale and sold them for \$25 each. Watkins, under his contract, began excavating in the rear of the leased building and tearing down the adjoining one, when the plaintiff forbade the defendants from entering upon the leased premises and brought this suit. No objection was made by Levine. He stood by his oral agreement, although, according to his testimony, McCarthy urged him to repudiate it as not being binding because not in writing.

A decree was entered dismissing the plaintiff's bill. It is argued by the defendants, besides other matters, that the decree was warranted on the ground that there was a surrender of the plaintiff's estate in the premises by operation of law within the meaning of R. L. c. 127, § 3. The trial judge did not make a finding that there was a surrender, and we are not prepared to say that the facts establish one. Even if we assume that the acts of the defendants were equivalent to taking possession of the leased premises, it does not appear that the plaintiff had abandoned its possession. *Amory v. Kannoffsky*, 117 Mass. 351. *Talbot v. Whipple*, 14 Allen, 177.

But the judge was well warranted in denying an injunction to the plaintiff in the circumstances here disclosed. McCarthy, who was its treasurer, manager, and owner of substantially all its capital stock, and who, the judge found, was duly authorized to act in its behalf, made a fair agreement with the defendants which he now repudiates, apparently because it was not in writing. There was evidence that when it was proposed to embody in writing the agreement between the plaintiff and Levine, McCarthy said "There is no need of signing this paper, because I will see my lawyer and get him to fix up a paper for Sam to sign, and then there wont be any chance for any law suit between Sam and I;" that he said nothing about any paper between his company and the defendants; and that he told them it was all right, and they might go ahead and make their contracts to erect the building. In reliance on his oral agreement and assurances the defendants in good faith proceeded

with their plans. As the trial judge found, "if prevented from tearing down the old building described in the lease to the plaintiff, and constructing a new building on said premises, they would be subject to serious expense, and possibly to considerable litigation." There is some evidence from which it might be inferred that, while giving the defendants the impression that he would make no trouble for them, McCarthy intentionally refrained from putting the agreement into writing with a purpose to take advantage of that fact later. The judge well may have concluded that the plaintiff had estopped itself from setting up as a basis for equitable relief, the fact that its agreement was not in writing. As was said in *Davis v. Downer*, 210 Mass. 573, 576, "Where a person has been induced to make expenditures upon land, to construct improvements thereon or to change his situation materially in reliance upon the performance of the oral agreement and in expectation of the rights to be acquired thereby, refusal to carry out the agreement is not merely deprivation of the rights it was intended to confer, which alone is within the statute of frauds, but is in addition 'an infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.'" *Williams v. Carty*, 205 Mass. 396. *Banaghan v. Malaney*, 200 Mass. 46. *Fenner v. Blake*, [1900] 1 Q. B. 426. And presumably the trial judge took into consideration the additional fact that the granting of an injunction would operate inequitably to the defendants and subject them to a loss out of all proportion to the actual injury, if any, suffered by the plaintiff. *Levi v. Worcester Consolidated Street Railway*, 193 Mass. 116.

Decree affirmed, with costs.

CATHERINE NEAFSEY vs. LEWONAS SZEMETA.

Plymouth. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Motor vehicle, In use of highway. Practice, Civil, Conduct of trial: requests for instructions, Exceptions.

At the trial of an action for personal injuries received when the plaintiff, a woman, was crossing a highway in a city and was run into by a motor car operated by the defendant, the evidence offered by the plaintiff tended to show that, when the plaintiff started to cross the highway, she saw the motor car about two hundred and eighty feet away, that she did not see it again until she was half way across the street and it was "right on her," that it then was going thirty miles an hour and that its speed had been increased as it approached her. The evidence offered by the defendant tended to show that due warning had been given to the plaintiff, and that she "stood still for a moment in the middle of the street and then started at a rapid walk or run to cross the street in front" of the car. The defendant asked for a ruling, "If the jury find that the plaintiff saw the defendant's car coming, heard his horn, and stood still in the middle of the street for an instant, long enough to see the approaching car, and then started to run across the street in front of the defendant's car, then the plaintiff was not in the exercise of due care and the jury must find for the defendant." The ruling was refused and the defendant excepted. The charge was full and comprehensive. *Held*, that the ruling properly was refused, both because it disregarded the effect of fright upon the plaintiff and the necessity of instant action in imminent peril; and also because it singled out and emphasized a part only of the controverted evidence and asked for a ruling as to its effect.

TORT for personal injuries received when the plaintiff, while crossing North Main Street in Brockton, was run into by a motor car alleged to have been driven negligently by the defendant. Writ dated August 6, 1918.

In the Superior Court the action was tried before *McLaughlin*, J. The material evidence, and a ruling asked for by the defendant and refused by the judge, are described in the opinion. The jury found for the plaintiff in the sum of \$750; and the defendant alleged exceptions.

C. G. Willard, for the defendant.

H. C. Thorndike, for the plaintiff.

JENNEY, J. The plaintiff, while crossing North Main Street in Brockton, was injured by an automobile operated by the defend-

ant. The accident happened in the forenoon and there was evidence that it was then raining. The street at or near the place of the accident was free from other vehicles. The plaintiff testified that she saw the automobile just before she stepped from the sidewalk, when it was about two hundred and eighty feet north of the place where it hit her and that she did not see it again until it was "right on her." When she was about halfway across the street, she was hit by the automobile, which was going so fast that it seemed as if it were "flying," and that all she had a chance to do was to "put . . . [her] hand out." The conflicting evidence as to speed varied from eight to thirty miles an hour. There was also evidence that, as the automobile approached the plaintiff, it accelerated its speed so that it was going "quite a little bit faster" than it had been.

On the defendant's evidence, the jury would have been justified in finding that the defendant gave due warning of his approach and that the plaintiff "stood still for a moment in the middle of the street" at the time her attention was called to the automobile and that she "then started at a rapid walk or run to cross the street in front" of it.

The case was submitted to the jury, who found for the plaintiff, without objection or exception except to the refusal of the judge to instruct the jury as follows: "If the jury find that the plaintiff saw the defendant's car coming, heard his horn, and stood still in the middle of the street for an instant, long enough to see the approaching car, and then started to run across the street in front of the defendant's car, then the plaintiff was not in the exercise of due care and the jury must find for the defendant."

The exception must be overruled. The request disregarded the effect of fright or the "necessity of instant action in imminent peril" and therefore could not be given. *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 469. *Green v. Haverhill & Amesbury Street Railway*, 193 Mass. 428. *Massie v. Barker*, 224 Mass. 420. Moreover, no exceptions were taken to the full and comprehensive instructions actually given relative to the subject matter of this request, which could not properly have been given because it singled out and emphasized a part of the controverted evidence and asked for a ruling as to its effect. *Grier*

v. *Guarino*, 214 Mass. 411. *Barker v. United States Fidelity & Guaranty Co.* 228 Mass. 421. *Whitman v. Fournier*, 233 Mass. 154.

Exceptions overruled.

ISIDOR MOSS vs. MAXWELL COPELOF & another.

Suffolk. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Contract, Construction, Validity. Bills and Notes, Validity. Corporation, Officers and agents.

The decision in *Moss v. Copelof*, 231 Mass. 513, that a provision in an agreement between three persons, constituting all the directors of a Massachusetts corporation, that, upon one of them severing all active connection with the corporation, he should "be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said . . . Company for unpaid stock subscription," did not mean that the \$600 was to be paid to the retiring director but that it should be credited on his account with the corporation, affirmed.

In an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as part of an agreement made upon the third director severing his active connection with the corporation, the defendants answered that the note was made pursuant to an alleged agreement, and it appeared that the agreement also provided that the plaintiff should receive the equivalent of one month's salary, \$600, which should "be applied on account of his indebtedness to" the corporation "for unpaid stock subscription." The stock had been issued to the plaintiff for his promissory note for \$3,500, upon which he still owed more than \$650. The agreement was made among the directors who, in so doing, intended to act as partners and not as directors and had in view their personal rights and obligations and not those of the corporation. At the time of the making of the agreement terminating the plaintiff's active connection with the corporation, the plaintiff was in its employ but there was no agreement in force that the employment should be continued and the corporation was not indebted to the plaintiff. *Held*, that

(1) Requests for rulings based on the assumption that the plaintiff had a contract with the corporation for continuous employment properly were refused;

(2) Requests for rulings in effect that, if the plaintiff in good faith believed he had an agreement for continuous employment by the corporation, his termination of the employment at the request of the other two directors was a sufficient consideration to the company for crediting him with \$600, properly were refused;

(3) The giving of \$600 to the plaintiff by the corporation was illegal, regardless of the purpose for which it was to be applied;

(4) Evidence tending to show that other stockholders of the corporation

obtained their stock by issuing notes therefor in violation of St. 1903, c. 437, § 14, was immaterial;

(5) The note in suit being issued as part of an invalid agreement, it was proper to refuse to rule that there should be a finding for the plaintiff.

CONTRACT on three promissory notes, signed by the defendants as makers and payable to the plaintiff, each for \$40, payable in six months and dated respectively July 21, July 28 and August 4, 1917. Writ in the Municipal Court of the City of Boston dated February 8, 1918.

The defendants' answer, besides other matters, alleged "that if the plaintiff offers evidence tending to show that the defendants made the notes set forth in the plaintiff's declaration, then the defendants say that said notes were made in pursuance of an illegal agreement and that said notes are therefore null and void."

On removal to the Superior Court, the action first was tried before *King, J.*, and there was a verdict for the plaintiff. The defendants alleged exceptions which were sustained by a decision reported in 231 Mass. 513.

The action then was heard by *Morton, J.*, without a jury. The agreement between the plaintiff and the defendants, referred to in the opinion, relating to the termination of his active connection with the M. & C. Skirt Company, in substance provided (1) that the plaintiff was "to terminate his employment" on January 1, 1917, (2) that on terminating his employment the plaintiff was to be "credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said M. & C. Skirt Company for unpaid stock subscription," (3) that the defendants would pay him \$125 a week for the six months next after January 1, 1917, (4) that during the six months beginning on July 1, 1917, the defendants would advance to him \$125 a week to be secured by plaintiff's stock in the corporation, (5) that during the year 1917 the defendants would not "increase their present salaries, and during said year, and thereafter" would not "do any act or thing to benefit their stock holdings or derive any benefit therefrom at the expense of the holdings of" the plaintiff, without first giving him "an opportunity to share in said benefits," and (6) the defendants should "have the privilege in their discretion, if they so desire, to do, to cause said M. & C. Skirt Company to make said

advances described in said paragraph four upon the terms therein stated."

When the time came for the advances to be made, the plaintiff agreed to take, for each weekly instalment of \$125, \$45 a week in cash and \$80 in two notes of \$40 each signed by the defendants, one note to be payable in six months and the other in a year. The first two six months' notes so given were paid when due. The notes sued on were the third, fourth and fifth six months' notes. When the time came for the delivery of the sixth lot of two notes, there was a dispute as to the collateral to be given by the plaintiff. Thereupon the defendants refused to make further advances. They also refused to pay the three notes here in question and this action was brought.

At the close of the evidence, the plaintiff asked for the following rulings:

"1. On all the evidence the plaintiff is entitled to a verdict for the amount declared on."

"7. Unless affected by other facts in the case, the words in the second paragraph of the agreement of December 19, 1916, to wit: 'upon said termination, said party of the second part shall be credited with an amount equivalent to one month's salary' shall be construed to mean that the defendants shall cause the plaintiff to be credited on the books of the company with said amount by giving full value therefor to the company.

"8. In the paragraph numbered second of the agreement of December 19, 1916, the words, 'upon said termination, said party of the second part shall be credited with an amount equivalent to one month's salary' shall not, as a matter of law, unless affected by other facts in the case, be construed to mean that the company shall credit the plaintiff with that sum without receiving consideration therefor."

"13. If the plaintiff was employed by the company at a yearly salary or by the year, this was evidence that he was under contract with the company in its employ for at least one year from May 9, 1916."

"15. If the plaintiff in good faith believed he had an agreement to work for the company at least for a year from May 9, 1916, the defendants' promise that the plaintiff should be credited with \$600 was a legal promise.

"16. If at the defendants' request the plaintiff gave up a right he had to continue in the company's employ, then the agreement whereby the plaintiff was to be credited with \$600 was an honest and legal one."

"18. If after May 9, 1916, the plaintiff continued in the employ of the company under agreement with its directors to so continue at his will, then the agreement to terminate his employment upon receiving \$600 out of the funds of the company was an honest and legal agreement.

"19. If the plaintiff in good faith believed he had an agreement to work for the company as long as he pleased, his termination of his employment was sufficient consideration moving to the company which made legal the defendants' promise that he should be credited with \$600.

"20. The plaintiff and the defendants, being all the directors of the company, could agree together without a formal meeting of the directors to pay the plaintiff \$600 out of the company's funds upon the termination of the plaintiff's employment on January 1, 1917, if he had a right to continue the employment after that date, until May 9, 1917, or for a period to end at his will.

"21. If there was a difference of opinion between the plaintiff and the defendants about his remaining in active connection with the corporation, the court, sitting as a jury, may find that the agreement to pay the plaintiff \$600 was an honest agreement."

"26. If the stockholders other than the parties in suit and Harry Bergson paid for their stock by promissory notes and not in cash, their holdings of stock are illegal and the agreement of December 19, 1916, is legal without their consent.

"27. The defendants must prove by a fair preponderance of the evidence that the notes are illegal.

"28. If the plaintiff had an open account with the company upon which he was credited by the company with \$600, this did not constitute an application on account of his indebtedness for unpaid stock subscription."

"32. The plaintiff was not legally indebted to the company for unpaid stock subscriptions on December 19, 1916.

"33. If on December 19, 1916, the plaintiff was not legally indebted to the company for unpaid stock subscriptions, the agreement to cause the company to credit the plaintiff with \$600 on

account of such alleged indebtedness was no fraud on the stockholders and was not illegal."

"35. The directors of a corporation, acting in good faith, have the power to employ a person for a period equal to the existence of the corporation."

The judge filed a memorandum of findings and rulings, in substance as follows:

It was held in this case in 231 Mass. 513, "that the \$600 named in article second [of the contract of December 19, 1916], was to be paid out of the funds of the corporation to the plaintiff, upon an agreement by the parties not made at a meeting of directors, and not submitted to the stockholders either in or outside of a meeting, and that such an agreement was illegal, if nothing was due to the plaintiff from the corporation.

"The books of the corporation show, and I find, that on January 1, 1917, there was credited to the plaintiff from the corporation up to that date the amount of \$656.92 on account of salary; that the amount was made up principally from a weekly credit of \$25, which the plaintiff agreed should be retained by the corporation to be applied on account of a promissory note of \$3,500 given by the plaintiff in payment of stock subscription, and that the plaintiff was indebted to the company upon that note to an amount in excess of \$656.92.

"It was contended by the plaintiff that that note was illegal, because in violation of St. 1903, c. 437, § 14, and that, therefore, the plaintiff had a credit balance. I find and rule against the plaintiff upon this point. I find that the corporation was not indebted to the plaintiff on January 1, 1917.

"The plaintiff contended further that he had a contractual right to continue in the corporation's employ after January 1, 1917, and that his relinquishment of such right legalized the payment to him and legalized the agreement to pay him \$600 from the funds of the corporation.

"I find the following facts: A contract was made between the parties on May 11, 1911, under which it was agreed that for five years the plaintiff should be 'factory manager' and 'president' of the corporation, and the corporation contracted with him to serve as factory manager with a certain salary therefor. He was also duly elected president. Upon the expiration of the five years,

and until January 1, 1917, the parties continued to draw weekly salaries as theretofore. No further express agreement as to the terms of employment was entered into by the parties personally. There was no formal directors' or stockholders' meeting indicating a corporate agreement with the plaintiff that he should continue during 1917 in the employ of the corporation, and no evidence from which I could find that the defendants made such an agreement as directors outside of a meeting.

"In the fall of 1916 various differences as to the management arose between the plaintiff and the defendant Copelof, which resulted in the decision that one or the other must sever his connection with the management. Negotiations extending over a considerable period resulted in the agreement of December 19, 1916. As a part of these negotiations, the plaintiff on December 12, 1916, was elected at his request president, but on the understanding that he should at once resign, the resignation to take effect on January 1, 1917, and in accordance with that understanding he did resign. He knew before he was elected that he would not serve as president. It is apparent from the evidence, that in these negotiations, as well as in their prior relations and agreements, the parties all considered that they were partners, entitled to an equal share in the profits and management of the business, and the evidence would warrant a finding that there was an implied agreement, at least, between them as partners in effect up to December 19, 1916. It is equally clear that they were intending to act as partners in the various negotiations and agreements, and not as directors, and had in view their personal rights and obligations and not those of the corporation. The original contract of 1911, the method of paying for stock by notes, the contract of December 19, 1916, and the oral evidence as to the negotiations leading up to it, all indicate such intention. The parties all entered into the contract of December 19, 1916, in good faith, in the honest belief that they were conserving the interests of the company, and that the contract was legal; but the effect of the contract, as shown by the above findings, was to obligate the company to pay to the plaintiff from its funds an amount which the company did not owe him, at a time when it was not under contractual obligations to him.

"I, therefore, find for the defendants."

Material portions of St. 1903, c. 437, § 14, were as follows: "Capital stock may be issued for cash, property, tangible or intangible, services or expenses. Stock which is issued for cash may be paid for in full before it is issued or by instalments. . . . No stock shall be at any time issued unless the cash, so far as due, or the property, services or expenses for which it was authorized to be issued has been actually received or incurred by, or conveyed or rendered to, the corporation; and the president, treasurer and directors shall be jointly and severally liable to any stockholder of the corporation for actual damages caused to him by such issue." *

P. Rubenstein, for the plaintiff.

H. Bergson & F. J. W. Ford, for the defendants, submitted a brief.

DE COURCY, J. This action, brought to recover on three promissory notes made by the defendants pursuant to a written agreement between the parties, was recently before this court; and the essential facts are set forth in the opinion, 231 Mass. 513. At the second trial in the Superior Court the judge, sitting without a jury, found for the defendants and filed a memorandum of findings. The case is now here on the plaintiff's exceptions to the denial of requests for rulings and to the exclusion of certain evidence.

The plaintiff and the defendants were the only directors, but not the only stockholders, in the M. & C. Skirt Company, a Massachusetts corporation. Differences as to the management arose between them, which resulted in the agreement of December 19, 1916, by which the plaintiff terminated his participation in the business. The second paragraph of the agreement provided: "Upon said termination said party of the second part shall be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said M. & C. Skirt Company for unpaid stock

* This section was amended by St. 1918, c. 257, §§ 350, 478, to take effect (St. 1920, c. 2) on February 1, 1921, by adding after the word "corporation;" and before the words, "and the president" in the last clause above quoted, the words: "nor shall any note or evidence of indebtedness, secured or unsecured, of any person to whom the stock is issued, be deemed to be payment therefor;"

subscription." The plaintiff's seventh and eighth requests in effect were, that by the true interpretation of this paragraph the \$600 was to be paid by the defendants, and that they were to cause the plaintiff to be credited therewith on the books of the company. This same contention was urged at the previous argument; but the court decided otherwise. As was said in the opinion (231 Mass. 513, 517): "The provision made by the article is that the plaintiff 'shall be credited' with \$600 not that he shall be paid \$600. That means 'credited' by the corporation." The trial judge rightly adopted this interpretation.

Construing the agreement as providing for payments from the treasury of the corporation, the plaintiff's requests numbered 13, 16, 18, 20 and 35 are based on the assumption that the plaintiff had a contract with the corporation to work for it to May 9, 1917, or indefinitely at his will, and that the agreement to terminate his employment was ample consideration moving to the corporation for such payments by the company. The trial judge, however, has found "There was no formal directors' or stockholders' meeting indicating a corporate agreement with the plaintiff that he should continue during 1917 in the employ of the corporation, and no evidence from which I could find that the defendants made such an agreement as directors outside of a meeting." This and the other findings that "the corporation was not indebted to the plaintiff on January 1, 1917," and that the corporation "was not under contractual obligations" to him, render these requests immaterial.

Requests numbered 15, 19 and 21 are, in effect, that if the plaintiff in good faith believed he had an agreement to work for the corporation, his termination of the employment at the request of the defendants was sufficient consideration to the company for crediting him with \$600. See *Blount v. Wheeler*, 199 Mass. 330, 336. But, as the judge found, ". . . they were intending to act as partners in the various negotiations and agreements, and not as directors, and had in view their personal rights and obligations and not those of the corporation." Further, in order to bind the property of the corporation, it must appear that from its standpoint the parties acted honestly and in good faith; and in effect the finding of the trial court is to the contrary.

The requests numbered 28, 32 and 33 are based on the claim

that the plaintiff's stock was illegally issued for his note (see St. 1903, c. 437, § 14); that any "credit" on account thereof would not constitute payment, and could not be enforced against the corporation. As to this it suffices to say that it was illegal to give the \$600 to the plaintiff regardless of the purpose for which it was to be applied. And as matter of fact the plaintiff from the beginning has acted on the assumption that the stock was legally issued to him. See *Soghomonian v. Garabedian*, 231 Mass. 445.

Request numbered 27 need not be discussed, in view of the evidence and findings. The offer to prove that all the other stockholders except the defendants and one Bergson, obtained their stock by issuing notes was rightly excluded, not being material in the present case. The request numbered 26 could not have been given even if the evidence were admitted. Presumably these other stockholders were acting as such in good faith. The legality of the agreement of December 19, 1916, was not dependant on their consent. *Palmbaum v. Magulsky*, 217 Mass. 306.

Finally the first request was denied rightly. The effect of the agreement, in pursuance of which the notes in suit were issued, was to obligate the M. & C. Skirt Company "to pay to the plaintiff from its funds an amount which the company did not owe him, at a time when it was not under contractual obligations to him." The \$600 was to be applied on account of the plaintiff's indebtedness for unpaid stock subscriptions, in violation of St. 1903, c. 437, § 14. The further illegality of the sixth clause of the agreement need not be considered. *Moss v. Cope-
lof, supra*.

Exceptions overruled.

J. CUSHING COMPANY vs. BROOKLYN TRUST COMPANY
& another, executors.

Middlesex. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Executor and Administrator. Limitations, Statute of.

Where, upon the proof of the will of a testator who died domiciled in this Commonwealth and who at the time of his death owned no real estate here nor any property subject to attachment by trustee process, three executors were appointed, two of whom, not being residents of Massachusetts, appointed the third as their resident agent in compliance with R. L. c. 139, § 8, and where, within six months after the executors had filed their bonds, the executor resident in this Commonwealth died and the surviving executors did not appoint an agent to succeed him under R. L. c. 139, § 9, until more than a year had elapsed from the date of the filing of their bonds as executors, an action brought in this Commonwealth against such surviving executors, the writ in which is served upon the new resident agent within two months after the filing of his appointment in the registry of probate, is not barred by the provisions of R. L. c. 141, § 9, as amended by St. 1914, c. 699, § 3, although it is not commenced within one year from the time of the filing by the defendants of their bonds as executors.

CONTRACT, against the Brooklyn Trust Company, a corporation doing business in Brooklyn in the State of New York, and Isaac H. Cary, also of Brooklyn, executors of the will of Alice B. Cary, late of Lexington, upon an account annexed for a balance of \$575.34, alleged to be due for hay, straw and feed furnished to the defendants' testatrix between May 2 and July 25, 1917, and for \$55.80 interest. Writ dated May 23, 1919.

The answer set up the special statute of limitations, R. L. c. 141, § 9, St. 1914, c. 699, § 3.

In the Superior Court the action was tried before *Chase*, J. Material facts are stated in the opinion. In answer to a special question, the jury found that the defendants' testatrix had received the goods described in the account annexed to the declaration and that the balances there set out were unpaid. The judge ordered a verdict for the defendants on the ground that the special statute of limitations was a bar to the action and reported

the case for determination by this court, judgment to be entered on the verdict if his ruling was right, and, if the action was not so barred, judgment to be entered for the plaintiff in the sum of \$631.14.

R. L. c. 141, § 9, as amended by St. 1914, c. 699, § 3, reads as follows: "An executor or administrator, after having given due notice of his appointment, shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, except as hereinafter provided. The court may allow creditors further time for bringing actions, not exceeding two years from the time of the giving of his official bond by such executor or administrator, provided that application for such further time be made before the expiration of one year from the time of the approval of said bond."

R. L. c. 139, §§ 9, 10, are as follows:

"Section 9. If an agent appointed under the provisions of the preceding section dies or removes from the Commonwealth before the final settlement of the accounts of his principal, another appointment shall be made and filed as above provided, and the powers of an agent appointed under the provisions of this and of the preceding section shall not be revoked prior to the final settlement of the estate unless another appointment shall be made as before provided.

"Section 10. Neglect or refusal by an executor or administrator to comply with any provision of the two preceding sections shall be cause for removal."

The case was submitted on briefs.

W. E. Hutchins & M. B. Lynch, for the plaintiff.

R. W. Hale & H. Guild, for the defendants.

DE COURCY, J. A jury has found that Alice B. Cary, the testatrix, owed the plaintiff the sum declared on, and that the debt was unpaid. The only question raised by the report is, whether recovery is barred by the special statute of limitations. R. L. c. 141, § 9, as amended by St. 1914, c. 699, § 3. The material facts and dates are as follows:

Alice B. Cary died in Lexington on January 11, 1918. The defendants, residents of New York, and Charles M. Hemenway, of Somerville, Massachusetts, were appointed and qualified as exec-

utors on February 25, 1918; and the defendants appointed Hemenway their resident agent, in compliance with R. L. c. 139, § 8. The executors filed an affidavit of the giving of notice of their appointment on April 23. On August 3, 1918, said Hemenway, agent and only resident executor, died. From August 25, 1918, to February 25, 1919, the statutory period during which the defendants were subject to suits, there was no executor present in this Commonwealth, and no resident agent upon whom service of process could be made; nor apparently was there any real estate, or any property of the estate here subject to attachment by trustee process. The defendants made no appointment of a successor to Hemenway as their resident agent until that of Mr. Hale, which was dated February 18, 1919, and was filed in the registry of probate on March 29, 1919. The writ in the present action was issued on May 23, 1919.

It is apparent from these facts that the plaintiff never had an adequate opportunity to enforce its claim. During the six months given for commencing suits, there was no one in this Commonwealth on whom service could be made, by reason of the default of the defendants. The fact that the defendants were executors of the will of a resident of this Commonwealth did not make them residents, nor subject them to the jurisdiction of our courts except by the method provided by the statutes. *Putnam v. Middleborough*, 209 Mass. 456, 457. It is suggested that the plaintiff needed only to draw a writ and hand it to the sheriff for service. *Gardner v. Webber*, 17 Pick. 407. While an action at law is deemed *prima facie* to have been commenced on the date of the writ, plainly it would not be "commenced," within the meaning of the statute, by handing the writ to a sheriff, knowing and intending that no service was to be made, and that the defendants should have no notice of its existence. *International Paper Co. v. Commonwealth*, 232 Mass. 7, 12, 13. See *Johnson v. Farwell*, 7 Greenl. 370. R. L. c. 139, § 9, provides: "If an agent appointed under the provisions of the preceding section dies or removes from the Commonwealth before the final settlement of the accounts of his principal, another appointment shall be made and filed as above provided, and the powers of an agent appointed under the provisions of this and of the preceding section shall not be revoked prior to the final settlement of the estate unless another appoint-

ment shall be made as before provided." A proceeding under § 10 for the removal of the executors, followed by the appointment of successors, and the selection by them of a resident agent, would probably have required more than the six months' period. If the defendants are right in their contention, non-resident executors and administrators can deprive creditors of a reasonable opportunity to enforce their claims, can secure exemption from liability for the estate of the deceased, and defeat the very purpose for which the statute was enacted, by wrongfully neglecting to appoint a resident agent whenever the original agent dies, resigns or removes from the Commonwealth before the beginning of the six months' period during which suits must be commenced. A construction of the statute so calculated to nullify its purpose and to promote injustice should not be adopted unless obviously such was the legislative intent.

As was said in *Bremer v. Williams*, 210 Mass. 256, 258: "It is an underlying principle in the application of the statute of limitations that before it can begin to run there must be some one in existence by whom, and a different person against whom, the claim may be enforced." Furthermore, such statutes generally provide that their operation shall be suspended during the period of time that the defendant resides out of the State. For instance, our general statute of limitations provides (R. L. c. 202, § 9) " . . . if, after a cause of action has accrued, the person against whom it has accrued resides out of the Commonwealth, the time of such residence shall be excluded in determining the time limited for the commencement of the action." See also § 18. In view of the short period allowed (apart from certain specified exceptions) for bringing actions against executors and administrators, the Legislature apparently attempted to provide so that there should be a representative of the estate within the jurisdiction of our courts during the one year now allowed by St. 1914, c. 699, for the settlement of estates. See *Eddy v. Adams*, 145 Mass. 489; *Converse v. Johnson*, 146 Mass. 20. In the event of the death, resignation or removal of such personal representative, without having fully administered the estate, a new administrator is to be appointed. The new representative was liable to the action of a creditor for two years under R. L. c. 141, § 17. *Eddy v. Adams*, *supra*. Now, under St. 1914, c. 699, § 7, the new administrator

"shall be liable to the action of a creditor for one year, less the time during which the preceding executors or administrators, having given due notice of their appointment, were in office and for a time not less than six months in any event." A non-resident executor or administrator cannot enter upon his duties until he has appointed an agent residing in this Commonwealth and has agreed in writing that service of legal process against him as such executor or administrator, or against him individually for his acts or omissions as such executor or administrator, shall if made on said agent have like effect as if made on himself personally within the Commonwealth. R. L. c. 139, § 8. In the event of the death or removal from the State of such agent, before the final settlement of the accounts of his principal, another appointment must be made; and neglect or refusal to comply with these provisions is made cause for the removal of such executor or administrator. §§ 9, 10. It may be added that these provisions for agents of non-resident executors and administrators are made applicable to non-resident guardians and conservators by R. L. c. 145, § 42; and to non-resident trustees by R. L. c. 147, § 14.

In our opinion it was the intention of the Legislature that during at least a period of six months there should be secured to creditors an opportunity to enforce their rights against the estates of deceased residents, and that when the executors or administrators are non-residents they should be subject to the jurisdiction of our courts. In view of the purpose and the provisions of the special statute of limitations, it cannot have been the legislative intent to bar an action by the lapse of the time during which no remedy was available, especially when the plaintiff's inability to bring suit is due to the wrongful failure of the defendants to appoint a resident agent. It may be that in said § 9, the language "another appointment shall be made and filed as above provided" should be construed as suspending the powers and rights of the defendants to perform the duties of their office until they make such appointment, just as they cannot enter upon such duties in the beginning until they appoint an agent. See St. 1879, c. 180, §§ 3, 4.

In any event, considering the limitation provisions as a whole, we are of opinion that the running of the statute was interrupted during the time that the defendants had no agent in the Common-

wealth on whom service could be made. As was said in *Clark v. Augustine*, 17 Dick. 689, 691: "It can hardly be supposed that it was within the contemplation of the Legislature that executors or administrators, administering an estate in New Jersey [Massachusetts], would or could cut themselves off from service of process by continuously residing out of the State; that a non-resident trustee would be permitted to start the statutory machinery necessary for the prompt settlement of the estate in his hands involving the institution of lawsuits by creditors, and then provide no means by which such lawsuits could conveniently or effectively be brought and maintained." The agent Hemenway died before six months from the appointment of the executors, and hence before suit could be brought by the plaintiff. The appointment of a successor was not filed until March 29, 1919, and the present action was brought within two months thereafter. Without deciding when the period of limitation fixed by the statute would expire in these circumstances, it is enough to say that in our opinion it did not bar the present action.

In accordance with the terms of the report, judgment is to be entered for the plaintiff in the sum of \$631.14.

So ordered.

MALHEM M. KADRA vs. MIDDLESEX AND BOSTON STREET
RAILWAY COMPANY.

Middlesex. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Contributory. Evidence, Relevancy and materiality.

At the trial of an action of tort against a street railway company for the loss of a horse caused by injuries received when he was on the highway in the care of the plaintiff's daughter, it is proper to exclude as immaterial evidence tending to show that with the plaintiff's knowledge the horse had been upon the highway unattended a number of times previous to the accident.

TORT for the loss of a horse, alleged to have been caused by injuries received when he was run into by an electric street car of the defendant. Writ dated December 27, 1916.

In the Superior Court, the action was tried before *Raymond, J.* The jury found for the plaintiff in the sum of \$342.65; and the defendant alleged exceptions, which, with the evidence essential to their determination, are described in the opinion.

J. P. Carr, for the defendant.

M. C. Nash & H. Hogan, for the plaintiff, submitted a brief.

CARROLL, J. The plaintiff's horse was injured by one of the defendant's cars, while upon the highway, between five and six o'clock on the night of October 10, 1916. There was evidence that the horse had been in a field, and as it was driven into the highway, the plaintiff's daughter said "she would drive him home." He was walking in the direction of the plaintiff's house, close to the street railway tracks, the daughter following about forty-five feet behind, when the car hit him.

The plaintiff was asked in cross-examination if the horse had not been loose in the highway a great many times that summer. This was excluded. The defendant offered to show that with the plaintiff's knowledge the horse had been loose a number of times before the accident. One of the witnesses for the defendant stated that he had seen the horse on the highway, unattended, many times during the summer preceding the accident. The judge thereupon said to the jury that this testimony and all testimony to the same effect should be disregarded by them, and if the horse was on the highway unattended previous to the time of the accident, that fact had no bearing on the case; to which statement the defendant excepted. These are the only questions open on this record.

There was no error of law in excluding the testimony offered or in the remarks of the presiding judge. The jury could have found that the horse when injured was in the care of the plaintiff's daughter. The evidence that at other times it had been seen unattended upon the highway was immaterial.

The defendant relies on *Leonard v. Doherty*, 174 Mass. 565, and *Johnstone v. Tuttle*, 196 Mass. 112. In the former case the plaintiff contended that his horse took fright at a sow and pigs belonging to the defendant, running into the highway from some bushes at the side of the way. As bearing on the negligence of the defendant in permitting the swine to be at large on the public street, evidence was admitted to show that they had been frequently seen at large outside the defendant's premises previous to the plain-

tiff's injury. It was held that the evidence, limited as it was by the instructions of the court, was admissible. In that case the important question was the negligence of the defendant in failing to keep the swine safely enclosed; and as tending to show that proper care was not taken, and that they did not escape by pure accident, without the defendant's fault, the evidence was admissible. In the case at bar, the conduct of the plaintiff in caring for his horse at the time of the accident, and not his conduct at another time, was the question before the jury. In *Johnstone v. Tuttle*, the plaintiff, while at work on a street lamp, was standing on a ladder, one end of which rested on his wagon; his horse started because frightened by the defendant's dog. The defendant contended that the horse had a habit of starting and that this was the cause of the plaintiff's injury. To prove that the cause was not the defendant's fault, as claimed by the plaintiff, it was proper to show the habit of the horse, and the evidence tending to establish this was held admissible. That case is not applicable to the case at bar, where the issue involved was the care of the plaintiff at the time of the accident, — not the habit or disposition of the horse.

The plaintiff admitted that at the close of his day's work he took the harness from the horse and turned it into a field and that, the last he saw of the horse, it "went into the highway" and "out of his sight." In view of this testimony, even if the evidence of the plaintiff's daughter were not believed, it was of no material importance that at other times the horse was seen at large on the highway, and there was no reversible error in excluding the evidence.

Exceptions overruled.

JOSEPH HERMAN & others vs. MIDDLESEX AND BOSTON STREET
RAILWAY COMPANY.

DAVID HERMAN vs. SAME.

HARRY HERMAN vs. SAME.

Middlesex. January 14, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, In use of highway, Street railway.

It is not negligent as a matter of law to drive at night upon tracks of a street railway, which are upon but at the side of a highway and are outside the part of the way used for travel, when there is deep snow upon the travelled part of the way and the street railway tracks are cleared.

At the trial of an action against a street railway company for injuries resulting from a collision after six and before seven o'clock in an evening in January, 1916, between a wagon driven by the plaintiff and an electric street railway car of the defendant, there was evidence that, because of the depth of snow on the travelled part of the way, the plaintiff was driving upon the street car tracks, which were within, but at the side of and outside of the travelled part of, the highway; that there was a lighted lantern attached to the back of his wagon; that just previous to the collision the plaintiff had met and had passed a motor vehicle; that the motorman of the street car, approaching the wagon over the brow of a hill from the rear, had seen the motor vehicle five hundred feet distant, had turned out the headlight of the car and, after passing the motor vehicle, had turned the headlight on again. The collision occurred over seven hundred feet from where the motorman first had seen the motor vehicle. The plaintiff testified that for a minute before the collision he heard the noise on the wires of an approaching car but that he did not know on which track it was moving and did not turn to see if it was behind him. *Held*, that

(1) It could not be ruled as a matter of law that the conduct of the plaintiff constituted contributory negligence;

(2) The question of negligence of the motorman was for the jury.

THREE ACTIONS OF TORT against a street railway company, the first action being for damage to horses, a wagon and other property of a partnership composed of four partners by reason of a collision of an electric street car of the defendant with the wagon of the partnership, and the second and third actions being to recover for personal injuries received by two of the partners. Writs dated February 25, 1916.

In the Superior Court the actions were tried together before

Hitchcock, J. The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered in its favor. The motion was denied. The jury found for the plaintiffs in the first action in the sum of \$300, for the plaintiff in the second action in the sum of \$1,500, and for the plaintiff in the third action in the sum of \$175; and the defendant alleged exceptions.

P. F. Drew, (C. S. Walkup, Jr., with him,) for the defendant.

C. Brewer, for the plaintiffs.

CARROLL, J. Between six and seven o'clock on the evening of January 3, 1916, the plaintiffs David and Harry Herman left Framingham for Boston in an open wagon drawn by two horses hitched tandem. David was driving the one between the shafts, and Harry, the lead horse. The wagon was run into from behind by one of the defendant's cars, the plaintiffs were injured and the property of the partners, who were the plaintiffs in the first action, was damaged. To the refusal of the trial judge to order a verdict in its favor, the defendant excepted.

There was evidence for the jury that a lighted lantern was attached to the rear of the wagon. After passing the waiting station at Natick, because of the depth of snow in the street, the plaintiffs drove upon the right hand car track of the double tracks, which ran along the left side of the way outside the travelled part but which we must assume were within the limits of the highway. Just before the accident an automobile going in the opposite direction, turned from the car tracks to go by the wagon. The motorman testified that coming over the brow of the hill, he saw the automobile and turned out the headlight, that after passing the automobile he turned the light on again and saw the team immediately in front of him but did not have sufficient time to avoid the collision.

The jury could have found on the evidence that no whistle was sounded until half a second before the accident, that no gong was sounded, and that, when the automobile first was seen it was five hundred feet from the car, — between the car and a building called the Evans House; that the light was turned on as soon as the automobile had passed; and that the collision took place two hundred feet beyond the Evans House. One of the plaintiffs testified that for a minute before he was struck he heard the noise on

the wire, of an approaching car, but that he did not know on which track it was moving and did not turn to see if it was behind him.

Although the tracks were outside the part of the way used for travel, it was not negligent, as matter of law, to drive upon them. It was not known that the car was coming; if the gong were sounded it was not heard by the occupants of the wagon, who were not obliged to be constantly on the watch for a car coming from behind, and well might rely on the assumption that the motorman would use ordinary care to avoid the collision. The motorman testified that the gong was rung, but he stated in the accident report that it was not rung. The jury could have found that with the head-light burning he might have seen the wagon in time to avoid a collision; and if the light was not lighted, that he was negligent in running his car at such a rate of speed without either ringing his gong or sounding his whistle, when, under the circumstances, vehicles might be expected on the car tracks. There was evidence of the plaintiffs' due care and of the defendant's negligence. *Manley v. Bay State Street Railway*, 220 Mass. 124. *Callahan v. Boston Elevated Railway*, 205 Mass. 422. *Sexton v. West Roxbury & Roslindale Street Railway*, 188 Mass. 139. *Vincent v. Norton & Taunton Street Railway*, 180 Mass. 104.

Exceptions overruled.

LEO COYNE vs. STEVEN P. MANIATTY.

ROSE COYNE vs. SAME.

Franklin. January 15, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, Motor vehicle. *Practice*, Civil, Conduct of trial: requests, rulings and instructions, Exceptions. *Agency*, Scope of authority or employment.

In an action against the owner of a motor truck used for delivering ice cream manufactured by the defendant, for personal injuries, received by the plaintiff in 1917 when riding on the running board of the truck and caused by negligence of the driver, there was evidence tending to show that the plaintiff, having ordered a gallon of ice cream of the defendant, called at his store and gave

directions as to the place of delivery, that an employee of the store took the ice cream to the sidewalk where the motor truck was standing, that a person in charge of the store told a bystander, who the plaintiff knew was not in the defendant's employ and who said he could operate the truck, to "Jump in and drive them [the employee and the plaintiff] up," that the ice cream was delivered and, as the truck was returning with the plaintiff riding on the running board, an accident happened through the driver's negligence which caused the plaintiff's injury. *Held*, that the question, whether the plaintiff was negligent in riding on the running board, was for the jury.

An exception to a refusal, by a judge presiding at a trial by jury, to grant a request for a ruling must be overruled if the ruling was given in substance in the charge to the jury.

A request for a ruling which assumes as true facts that are in controversy properly may be refused.

A refusal to grant a request, to give to a jury in terms a ruling which is a correct statement of law pertinent to the issues on trial, is not reversible error where the judge in his charge gives full and correct instructions to the jury on the subject matter of the ruling.

At the trial of an action for personal injuries caused by the negligent operation by a driver other than the defendant of a motor truck of the defendant, the question, whether the relation of master and servant existed between the defendant and the driver, was in issue. It appeared that the truck was used solely for the delivery of ice cream manufactured by the defendant, and that on the day of the accident the defendant was absent from his business and had left the truck in front of his store. There was evidence tending to show that the defendant had intended that his business should be carried on in his absence, that he had left his father in charge of it and that the carrying on of the business included not only the manufacturing and selling, but also the delivering of ice cream to customers, that the plaintiff had ordered ice cream and, there being no employee who could operate the truck, that the defendant's father had asked a bystander, who had stated that he could operate it, to drive it for the purpose of delivering the plaintiff's order, and that negligent operation of the truck by him, as he was returning to the defendant's store after delivering the order and with the plaintiff riding on the running board, had caused the plaintiff's injuries. *Held*, that a finding was warranted that such transient employment of a stranger for the purpose of delivering ice cream in the manner ordinarily employed by the defendant was within the scope of the authority of the defendant's father.

TWO ACTIONS OF TORT, the first action being by a boy eighteen years of age for personal injuries caused by negligent operation of a motor truck of the defendant while the plaintiff was riding on the running board, and the second action being by the mother of the plaintiff in the first action for consequential damages. Writs dated December 20, 1917.

In the Superior Court the actions were tried together before *Wait, J.* The material evidence is described in the opinion. At

the close of the evidence, the defendant asked for the following rulings among others:

"3. If the jury find that the plaintiff's want of ordinary care, or his misconduct while riding on the defendant's automobile contributed to produce the injury, the plaintiff is not entitled to recover.

"4. Mere possession of an automobile raises no presumption that the person operating it is a servant or agent of the owner."

"6. If the jury find that Peter Maniatty's duties were that of making ice cream and candy in the cellar, and that in consenting to the automobile being taken by a stranger, not in the defendant's employment, he was acting outside the scope of his authority, then the plaintiff is not entitled to recover."

"8. It was not within the scope of the authority of Peter Maniatty to invite or direct a stranger to drive the automobile of the defendant.

"9. An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master."

"11. If the jury find that Leo Coyne desired to ride on the running board of the automobile, after being requested to sit on the seat, and because of being on the running board he was injured, the defendant is not liable."

The rulings were refused. The jury found for the plaintiff in the first action in the sum of \$1, and for the plaintiff in the second action in the sum of \$300; and the defendant alleged exceptions.

The cases were submitted on briefs.

T. M. Hayes, for the defendant.

F. J. Lawler, for the plaintiffs.

JENNEY, J. On September 19, 1917, and for a considerable time previous to that date, the defendant was engaged in the manufacture and sale of ice cream and confectionery in Greenfield, maintaining a place of business where he received orders for and manufactured and sold his products. He had a motor truck, which he used solely in the delivery of ice cream, and which he left in front of the store when he went away on the day stated. On that day, he testified that he left his wife in charge of his business. She, however, did not give her entire time to the business, as she lived over the store and also attended to the

performance of her household duties. There was evidence that the defendant's father, who formerly had owned the business, worked for him, and sometimes waited on customers, taking orders and selling goods; and that on that day, the wife was not in the store, only the father being present when the plaintiff went there as herein described. One Jarvis also had been employed for a short time, whose duty it was, the defendant testified, to pack ice cream and to deliver it in his absence when requested by his wife. The defendant also testified that when he left town, he left whoever was in charge of his store to do as much business as possible; that when orders were received, they were to be delivered by some one who worked for him; and that at the time in question, he had no one to drive his motor truck in his absence, and, if any order had to be delivered, it necessarily would be delivered on foot.

About noon of the day stated, Leo Coyne, eighteen years old, ordered a gallon of ice cream over the telephone, giving the order to the defendant's wife and telling her that he would come to the store to pay for it and to give directions as to the place of its delivery. In the evening he went to the store and there saw the defendant's father who asked him where the ice cream was to be delivered and requested him to point out the place of delivery. The father packed the order, and Jarvis took it to the sidewalk, having been previously directed by the defendant's wife to deliver it. One Dinsmore, who, as Coyne knew, was not in the defendant's employ, was standing on the sidewalk. The defendant's father asked him if he knew how to run an automobile, and he said he did. Thereupon the father said, "Jump in and drive them up." Dinsmore and Jarvis occupied the only seat, which was not long enough to accommodate three, and Coyne stood on the running board. Dinsmore drove the motor truck. The ice cream was delivered, and, while returning, Coyne was injured. The jury were "permitted to inspect" the motor truck.

The defendant does not question the sufficiency of the evidence to warrant a finding that Dinsmore's negligence caused the injury, but contends that the plaintiff was guilty of contributory negligence, and that Dinsmore did not act within the scope of authority properly conferred on him.

The facts stated were largely in controversy, but the jury

properly could have found them to have been as recited. Two actions were brought, one by Coyne to recover the damages sustained by him, and the other by his mother for her consequential loss. Manifestly both cases are governed by the same considerations. The jury found for the plaintiffs. The only exceptions are to the refusal of the judge to give certain rulings.

1. Requests numbered 3 and 11 related to the due care of the plaintiff. They were refused rightly. It was for the jury to determine whether Coyne was negligent in riding on the running board. The position of the plaintiff was somewhat analogous to that of one who rides on the running board of a street railway car. See *Powers v. Boston*, 154 Mass. 60; *Egan v. Old Colony Street Railway*, 195 Mass. 159; *Olund v. Worcester Consolidated Street Railway*, 206 Mass. 544; *Walsh v. Boston Elevated Railway*, 222 Mass. 275. The third request was given in substance, and the eleventh also was given so far as proper in view of the controverted facts.

2. The failure to give the fourth request, based on *Hartnett v. Gryzmish*, 218 Mass. 258, that "Mere possession of an automobile raises no presumption that the person operating it is a servant or agent of the owner," did not prejudice the defendant. The jury were carefully and fully instructed that the plaintiffs could not recover unless the motor truck was being operated on the defendant's behalf, in his business, and under his authority, with abundant application of the evidence to the law. The jury were instructed that the plaintiffs, in order to recover, must sustain the burden of proving that the driver of the motor truck was the servant of the defendant. While the request could have been given properly, the failure to give it, in view of the charge, was not reversible error.

3. The sixth request, which sought a ruling that the plaintiffs could not recover if the defendant's father acted outside the scope of his authority "in consenting to the automobile being taken by a stranger," was refused properly because it assumed that the father merely assented to the use. The evidence justified the finding that he directed Dinsmore to use it.

4. The remaining requests relate solely to the authority of the father to direct Dinsmore to operate the motor truck for the purpose of delivering ice cream. The last of these stated ab-

strictly the rule of law, that an act done by a servant must be within the scope of the employer's business. The instructions given fully and correctly covered this phase of the case. The eighth request, however, directly challenges the power of the father to authorize Dinsmore to operate the motor truck. The judge dealt with this question solely on the basis that it could be found that Dinsmore was not a mere volunteer; and said that "the circumstances of the case show and would justify you [the jury] in saying that Peter Maniatty had authority, had the power, from his ordinary duties in connection with the defendant's business, to employ a man or to let him take the machine and to subject his employer to liability in consequence. Well, that is for you to say, on the evidence. . . . The defendant says that he left his wife in charge of the business, that she was the responsible head of it, and that she was the person, and the only person, that was authorized to direct what should be done. If that is true, and she did not act in this case . . . then there is no liability on the part of the defendant. It does not lie within the power of anybody I may choose to employ to employ somebody else and subject me to liability, and I am not responsible for the acts of a volunteer who undertakes to do my business without any authority from me. But if you are satisfied by the evidence that Peter Maniatty was his agent in connection with the business, that it was the understanding of the defendant that, while he was gone, Peter could do such things as this, then you would be justified in inferring authority in Peter to do it, and that authority has got to come either by direct word of mouth or writing from the defendant, or from the fair inference from the general conduct of his business; in other words, what I have said with regard to the conduct of the business, the acts which are done with the knowledge and without objection of the person in charge of the business, which were in the regular and customary course of the defendant's business, would justify you in finding that they were binding upon the defendant and that any negligence in connection with them would be negligence for which he would be responsible."

While the question is close, we think that the evidence justified the submission of the case to the jury, as to the authority of the father to arrange for the delivery of the ice cream by Dinsmore.

The defendant was away; he left his motor truck in front of his store; it was used solely for the delivery of ice cream; and the defendant intended that his business should be carried on and ice cream delivered in his absence. Although he testified that, in his absence, ice cream would have to be delivered on foot, the jury were not bound by his undisclosed limitation on the manner in which his business usually was transacted, and could find that he had left his father in charge of his business with authority to carry it on in his absence; and further, that the transient employment of a stranger for the purpose of delivering goods in the manner ordinarily employed, was within the scope of the father's authority. The jury would have been justified in finding that the defendant had placed his father in a position where the proper conduct of the business required him to do that which he did. In this case it could have been found that the power to sell implied the right to complete the sale by delivery, using the means customarily provided for that purpose. *Sandon v. Kendall*, 233 Mass. 292. The instructions given to the jury, without any exception having been taken thereto, were based upon and restricted to this aspect of the case. The exceptions must be overruled.

So ordered.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *vs.*
J. WESTON ALLEN, trustee in bankruptcy, & another.

Suffolk. January 15, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Assignment. Insurance, Life: assignment of policy. Bills and Notes, Validity. Equity Pleading and Practice, Finding by trial judge, Answer.

The beneficiary and the insured under a policy of life insurance executed an assignment of the policy under seal, "In Consideration of Fifteen Hundred Dollars to us paid," to one from whom the insured had borrowed that sum of money. The insured also delivered to the assignee a promissory note bearing his signature and the forged signature of the beneficiary. The assignment did not state that it was given as security nor did it contain any reference to the note. Because of claims made, after the death of the insured, by the assignee and by a trustee in bankruptcy of the beneficiary, the insurer brought a bill of interpleader and

a judge, who heard the claims of the defendants, found that the policy was pledged as security to the assignee for the loan of \$1,500 and refused a request of the trustee in bankruptcy of the beneficiary that he rule "that the assignment . . . was made as collateral security for the payment of said note." The trustee alleged an exception. The evidence was not reported. *Held*, that the finding of the judge must be assumed to be warranted by the evidence and that the exception must be overruled.

In the same suit it was *held* that, no question of pleading having been raised at the trial, the defendant assignee was not precluded from insisting upon his rights under the assignment by an allegation in his answer, to which a copy of the assignment was annexed, that the assignment was given as security for the note.

In the suit above described, a request by the trustee in bankruptcy for a ruling that, if the beneficiary under the policy "did not sign the note, but did sign the assignment," the assignee "could not recover," was *held* to have been refused properly.

It also was *held* that, a finding being warranted that the assignee held the policy as a pledge for the payment of money advanced and interest by virtue of an assignment executed by the beneficiary under the policy, his claim, to the extent of the amount due him, was superior to the claim of the trustee in bankruptcy, which was no greater than that of the beneficiary, and that a refusal to rule that the assignee "could not recover" was proper.

BILL OF INTERPLEADER, filed in the Superior Court on June 29, 1914, alleging in substance that claims to the proceeds of a policy of life insurance issued by the plaintiff upon the life of one George E. Williams had been made, after the death of the insured, by the defendant J. Weston Allen, trustee in bankruptcy of Sadie E. Williams, the beneficiary named in the policy, and by the defendant Augusta M. Bibber, who alleged that the insured and the beneficiary had assigned to her their rights in the policy to secure the repayment of \$1,500 loaned by her.

The assignment, which was dated September 8, 1902, and was executed under seal by Sadie E. Williams and by George E. Williams, was in substance as follows: "In Consideration of Fifteen Hundred Dollars to us paid, we hereby assign, transfer, and set over unto Augusta M. Bibber . . . her executors, administrators, and assigns," the policy in question "together with any and all profits due or to become due thereon." It contained no mention of a note nor of the fact that it was executed as security.

The allegation in the answer of the defendant Bibber, to which reference is made in the opinion, was that George E. Williams and Sadie E. Williams on September 8, 1902, gave to her "their promissory note for \$1,500 . . . and that as security for said

note the said George E. Williams and Sadie E. Williams at the same time gave . . . [her] an assignment of the policy," a copy of the assignment being annexed to the answer.

By an interlocutory decree the plaintiff was discharged upon paying into court the proceeds of the policy in question. The case then was heard by *Fox, J.*, upon the issues raised by the bill and the answers of the defendants. The material evidence, requests of the defendant Allen, trustee, for rulings and findings of the judge are described in the opinion. The judge ordered a decree allowing the claim of the defendant Bibber; and the defendant Allen, trustee, alleged exceptions.

H. W. Packer & J. W. Allen, for the trustee in bankruptcy.

W. E. Rowell, for the defendant Bibber.

DE COURCY, J. The Connecticut Mutual Life Insurance Company in December, 1898, issued to George E. Williams a policy of \$5,000 payable on his death to Sadie E. Williams, wife of the insured. Williams borrowed \$1,500 from Augusta M. Bibber in September, 1902, and delivered to her the insurance policy, an assignment of the same signed by himself and wife, and a promissory note signed by him and bearing the forged signature of his wife. Williams died in July, 1913, and in November, 1913, said beneficiary Sadie E. Williams was adjudicated bankrupt. Both Miss Bibber and the trustee in bankruptcy of Mrs. Williams made claim to the proceeds of the policy; whereupon the insurance company brought this bill of interpleader, and later was discharged upon paying the money into court. The trial judge ordered a decree in favor of the defendant Bibber "for the amount secured by the assignment, with interest thereon." The case is here on exceptions taken by the defendant Allen, trustee.

The fourth request of the defendant trustee was "that the assignment of the policy in question was made as collateral security for the payment of said note." The judge refused to make that finding, and apparently found that the policy was pledged as security for the loan of \$1,500 to Williams, and not as security for the note as such. The evidence is not before us, and we must assume that it warranted the findings made. In fact it is alleged in the bill that the defendant Bibber claimed under an assignment executed "In Consideration of Fifteen Hundred Dollars," and that the defendant trustee in bankruptcy denied the validity of the

assignment. In his answer said trustee admitted the truth of these allegations. The assignment itself recites that it was given "In Consideration of Fifteen Hundred Dollars to us paid." No question of pleading was raised; and the defendant Bibber is not precluded by the statement in her answer that the assignment was given as security for the note. At the trial it was her contention that the signature "Sadie E. Williams" on the note was genuine.

The foregoing disposes also of the fifth request, "that if Sadie E. Williams did not sign the note, but did sign the assignment, the claimant Bibber could not recover in this cause." The request could not be given for the further reason that the judge might well have found that the note was the valid promissory note of George E. Williams, (R. L. c. 73, § 141,) and that Mrs. Williams by joining in the assignment to secure a debt of her husband, thereby validly pledged her interest in the policy. *Browne v. Bixby*, 190 Mass. 69.

We find no error in the refusal to rule "that the claimant Bibber could not recover in this cause." The judge was warranted in finding that she held the policy as a pledge for the payment of the money advanced and interest, by virtue of an assignment executed by Mrs. Williams. To the extent of the amount due, her claim is superior to that of the defendant Allen, trustee in bankruptcy, whose rights are no greater than those of Mrs. Williams. *Upton v. National Bank of South Reading*, 120 Mass. 153. See *Jeffrey v. Rosenfeld*, 179 Mass. 506.

Exceptions overruled.

JOHN M. QUINLAN vs. HUGH NAWN CONTRACTING COMPANY.

Suffolk. January 15, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Negligence, Contributory, In use of highway.

At the close of the evidence at the trial of an action against the owner of a motor vehicle for personal injuries received when the plaintiff, as he was crossing a highway after St. 1914, c. 553, was enacted, was run into by the vehicle, the defendant asked for and the judge refused to give a ruling that, upon all the

evidence, the plaintiff was guilty of contributory negligence. There was evidence tending to prove that, previous to the accident, the plaintiff had been walking on a sidewalk, which, as he faced, was on the right hand side of the street upon which the accident occurred, and that the street, which was seventy-six feet wide, extended twelve hundred and thirty-one feet ahead of him without corner or angle, the nearest eight hundred and fifty-one feet being a roadway on a bridge over railroad tracks. It did not appear whether the highway was much frequented at that place or hour, or whether the bridge over the railroad track obstructed the plaintiff's view. There was further evidence tending to show that the plaintiff was accompanied by three companions and that, the companions having looked ahead and not seeing the defendant's vehicle approaching, all four started across the street nearly at right angles with the street but facing slightly in the direction from which the vehicle was approaching, and that, before they had reached the middle of the highway, the vehicle, which was travelling at the rate of forty miles an hour on the nearest of two street railway tracks, swerved toward the plaintiff and struck him. *Held*, that the ruling requested properly was refused.

At the same trial the defendant asked for and the judge refused to give a ruling that, "If, before the plaintiff started to cross the street, he looked and did not see the automobile, and if you find that the automobile must have been within his view, then, as a matter of law, he looked carelessly and if that contributed to his accident the plaintiff is not entitled to recover." *Held*, that, since it singled out and emphasized only a part of the salient features of the evidence, the ruling properly was refused.

TORT for personal injuries received on November 7, 1916, when the plaintiff was run into by a motor vehicle of the defendant operated by its employee on Summer Street Extension in Boston. Writ dated March 1, 1918.

In the Superior Court the action was tried before *Sisk, J.* The material evidence and exceptions by the defendant to refusals by the judge to give certain rulings are described in the opinion.

In the course of the charge to the jury, the judge instructed them as follows: "If you undertake to cross a street that is being used by vehicles passing and repassing, and you look and see in the distance at a substantial distance away from you, assuming it is in the night time, you see a light and you assume that it is a vehicle, but from its position and its apparent distance from you you felt that you could pass over that street in safety, then you might say in a case of this kind that even if they saw an automobile in the distance it was so far distant that they had a right to go out into the street, or might go out into the street and their conduct would be the conduct of a reasonably prudent man under the circumstances; that is to say, they had time to cross the street in safety."

The foregoing portion of the charge being called to the attention of the judge by the defendant, who saved an exception thereto, the judge further instructed the jury as follows:

"I undertook, gentlemen, to state a hypothetical case to you about a man before he starts to cross a street looking in the distance and seeing an automobile and then concluding that he had ample time to cross the street, that you might be justified under those circumstances in finding such a person was in the exercise of due care. I did not intend in that statement that you should assume that I was speaking of this case. I entirely disassociated that from the present case because the testimony would not warrant me making that as a statement in this case. I was only trying to give you an illustration of the duties of a man who is undertaking to cross a street where vehicles were passing and repassing; and after all you might cite as many examples as you please. The standard is the conduct of a reasonably careful man under like circumstances. For instance, if one of you undertook at one o'clock today to go to State Street from here you would have to cross Washington Street. Now when you undertook to cross Washington Street the care that you would exercise in so doing would be an entirely different care from the care you would exercise if you were crossing a little street up here in one of our back towns, Saugus we will say, where rarely vehicles cross or pass. In other words, the circumstances of each case in a way determine the standard of care, because what might be careless in one case would not be in another. That is all I meant by that."

The jury found for the plaintiff in the sum of \$8,500; and the defendant alleged exceptions.

R. L. Mapplebeck, for the defendant.

W. Flaherty, (*R. Clapp & L. F. Corcoran* with him,) for the plaintiff.

JENNEY, J. In the evening of November 7, 1916, at about nine o'clock, the plaintiff with three companions left his place of employment, and walked through an intersecting street to Summer Street Extension in Boston. Because of information that the draw in the bridge in that street over North Point Channel was obstructed by a street railway car which had fallen through the draw while open, it was decided to go along that street, in an easterly direction and by a more circuitous route, in order to

get home. It did not appear whether Summer Street Extension was much frequented at the place and hour of the accident herein-after described. Where the accident happened the street was seventy-six feet wide between the curbings. From that point, it extended easterly twelve hundred and thirty-one feet without curve or angle, and there was no grade which obstructed the view for that distance. A bridge carried the roadway over railroad tracks for the last eight hundred and fifty-one feet of this distance; but it did not appear in the record whether the bridge interfered with the view.

There was evidence that the four walked eastward along the northerly sidewalk in the direction of South Boston. When they were nearly opposite A Street, they started to cross Summer Street Extension at almost a right angle, but "facing slightly in the direction of South Boston." While so crossing, the plaintiff, who with one companion was following the other two, was hit by the defendant's automobile. The plaintiff testified that he had no recollection of how the accident occurred except that he tried to save himself by hanging on to the automobile; and that he had no memory whether he saw it before the accident, or whether there was anything to obstruct his sight. His companions testified in substance that upon attempting to cross, they severally looked in the direction of South Boston, and saw no automobile; that they did not see it until it was about fifteen feet from them; that it was on the southerly street railway track, which was at the left of the centre of the travelled way as one comes from South Boston; and that the automobile was going at the rate of forty miles an hour. One testified that the automobile "swerved a little toward him and struck the plaintiff." The happening of the accident as described by the witnesses called by the defendant presented an entirely different picture.

The case is here, after a verdict for the plaintiff, on the defendant's exceptions to a portion of the charge and to the refusal of the presiding judge to give two rulings, all other exceptions having been waived. The exceptions do not raise any question as to the sufficiency of the evidence to warrant a finding of negligence of the operator of the automobile.

1. The first request asked for a ruling that, upon all the evidence,

the plaintiff was guilty of contributory negligence. This properly could not have been given. Under the circumstances set forth in this record, it could not have been ruled as matter of law that the plaintiff was negligent. The case in this aspect is within the reasoning of *Hennessey v. Taylor*, 189 Mass. 583, *Jedrey v. Boston & Northern Street Railway*, 198 Mass. 232, *Creedon v. Galvin*, 226 Mass. 140, and *Emery v. Miller*, 231 Mass. 243. It could not be held as matter of law that the defendant had sustained the burden of proof as to the affirmative defence of contributory negligence. St. 1914, c. 553. *Duggan v. Bay State Street Railway*, 230 Mass. 370, 379.

2. The only other refusal to rule, to which an exception is now urged, is: "If, before the plaintiff started to cross the street, he looked and did not see the automobile, and if you find that the automobile must have been within his view, then, as a matter of law, he looked carelessly and if that contributed to his accident the plaintiff is not entitled to recover." This request singled out and emphasized part only of the salient features of the case. It disregarded other facts which might have been found on the evidence and which related to the plaintiff's due care, in that, among other things, it omitted all reference to the conduct of the plaintiff's companions and assumed that the plaintiff did look for and did not see the automobile, when the record was silent as to such conduct on his part. It omitted all reference to the speed and course of the automobile. It postulated the plaintiff's care simply on what he did and what he saw "before . . . [he] started to cross the street." This request properly was refused. *Neafsey v. Szemeta*, ante, 160, and cases cited.

3. The remaining exception relates to a part of the charge to the jury. When this exception was taken, the judge further instructed the jury in substance that what he had said was by way of illustration and that it had not been intended to refer to the case on trial, because "the testimony would not warrant . . . [him in] making . . . [it] as a statement in this case."

The right of the judge to illustrate the application of a principle of law by stating it in its application to cases not like that under consideration is plain, and unless it positively appears that the power has been so used as to result in prejudice, its exercise is not reviewable. Here the rights of the defendant were fully

protected by clear explanation and limitation. *Commonwealth v. Johnson*, 199 Mass. 55, 63. *Draper v. Cotting*, 231 Mass. 51.

Exceptions overruled.

BESSIE BOVARNICK vs. PHILIP DAVIS.

Suffolk. January 15, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Agency, Existence of relation. Husband and Wife. Bills and Notes.

At the trial of an action by an indorser against the maker of a promissory note, it appeared that the plaintiff, a married woman, became a holder in due course of the note before its maturity, that she indorsed it in blank and delivered it to a corporation to pay an indebtedness owed to it by her but charged upon its books to the name of her husband, that the note was not paid at maturity and was delivered by the corporation to the plaintiff's husband, who "handed" it to the plaintiff, and that the corporation "charged back" to the husband against certain dividends to which he was entitled the amount of the plaintiff's indebtedness to it. The trial judge found that the husband, in the transactions above described, acted as the plaintiff's agent, lending her his credit with the corporation upon the return of the note to her; and refused to rule that the plaintiff was not a holder of the note in due course or that the result of the transaction between the plaintiff's husband and the corporation was either that he became the purchaser of the note or that the defendant was discharged. *Held*, that

(1) The finding that the husband in the transactions above described acted as the agent of the plaintiff was warranted;

(2) The plaintiff, as the person in possession of the note with the husband's assent, was entitled to maintain the action in her own name in any event;

(3) The "charging back" of the amount of the note to the account of the plaintiff's husband with the corporation was not a payment of the note by any one but operated only to discharge the plaintiff's liability to the corporation, so that the plaintiff was remitted to her former rights against the defendant.

CONTRACT by an indorser against the maker of a promissory note for \$1,000, dated April 12, 1918, payable in ten months from its date to Harry E. Burroughs and bearing a special indorsement by the payee to the order of Samuel H. Burroughs and indorsements in blank by him and by the plaintiff. Writ in the Municipal Court of the City of Boston dated March 17, 1919.

The defendant's answer contained, besides a general denial, allegations of fraud practised by the payee of the note upon the

defendant, the maker, in procuring it. There was no allegation of payment or satisfaction of the note.

The material evidence at the hearing in the Municipal Court is described in the opinion. At the close of the evidence, the defendant asked, among others, for the following rulings:

"3. If the plaintiff in July, 1918, discounted the note in suit and two others aggregating in face value \$3,000, paying therefor \$2,500 as claimed by her, and if she in or about December, 1918, paid the note in suit to the Boston Egg Company, Inc., in satisfaction of a claim by that company against her for \$1,000, and if upon the note maturing and not being paid by its maker, the Boston Egg Company, Inc., reimbursed itself by deducting from the dividends otherwise payable to Harry Bovarnick, the husband of the plaintiff, the amount of \$1,000, so that it has no further claim thereon, and the indorsement by the Boston Egg Company has been crossed off, then the plaintiff is not for the purpose of this suit a holder of the note in due course and for value.

"4. If the plaintiff in July, 1918, discounted the note in suit and two others aggregating in face value \$3,000, paying therefor \$2,500, as claimed by her, and if she in or about December, 1918, paid the note in suit to the Boston Egg Company, Inc., in satisfaction of a claim by that company against her for \$1,000, and if upon the note maturing and not being paid by its maker, the Boston Egg Company, Inc., reimbursed itself by deducting from the dividends otherwise payable to Harry Bovarnick, the husband of the plaintiff, the amount of \$1,000, so that it has no further claim thereon and the indorsement by the Boston Egg Company has been crossed off, then the defendant is not liable in this action.

"5. The plaintiff is not a holder in due course of the note in suit.

"6. If the amount due on the note in suit was paid by Harry Bovarnick, then the note was either purchased by him or paid so as to discharge the defendant.

"7. The plaintiff cannot be a holder of the note through a negotiation thereof to her by her husband."

The rulings were refused. The trial judge made the following findings:

"I find that in the negotiation of the note in suit by the plaintiff to the Boston Egg Company, and in its re-delivery to her upon dishonor, the plaintiff's husband merely acted as her agent, lend-

ing her his credit upon its return to her; that he was never a holder or owner thereof, and that the plaintiff does not claim under him."

The judge found for the plaintiff and at the request of the defendant reported to the Appellate Division his refusal to give the rulings above quoted. The Appellate Division dismissed the report; and the defendant appealed.

G. P. Davis, for the defendant.

S. A. Dearborn, for the plaintiff.

JENNEY, J. On April 12, 1918, Philip Davis executed and delivered to Harry E. Burroughs his promissory note, complete and regular on its face, and payable on time. The plaintiff took the note in good faith and for value, before its maturity and without notice of any infirmity in the instrument or defect in title of the person negotiating it. The terms of the note negative its previous dishonor. The plaintiff then had the rights of "A holder in due course." R. L. c. 73, § 69. It is conceded that, before the maturity of the note, it was indorsed by the plaintiff to the Boston Egg Company in payment of her pre-existing indebtedness to that company, which indebtedness either was or could have been found to be charged on the books of that company to her husband. The note was not paid at maturity and thereafter it was delivered to the plaintiff's husband, and the sum payable according to its terms was "charged back" to the husband on the books of the company against certain dividends to which he was entitled. The husband "handed" the note to the plaintiff who thereafter brought this action.

The defendant contends that the finding for the plaintiff was wrong (1) because she had no title to the note and because the evidence is not sufficient to support a finding that she was entitled to maintain suit as a holder with the assent of her husband, who, the defendant contends, was the real party in interest; and (2) because the transaction at the time of the maturity of the note amounted to its payment and extinguished the liability of the maker.

1. The trial judge found that the plaintiff's husband in all that he did acted as her agent and that she does not claim under him. It is contended that the evidence did not justify the finding. It was sufficient to warrant the conclusion that the husband, in delivering the note to his wife, did not do so with the intent merely to give

her its custody, and that he received it for her benefit and delivered it to her as her own. The note had never been owned by the husband and the inference that he received it in behalf of his wife was well warranted. The finding that he acted as her agent was therefore supported by the evidence and must stand. See *Leavitt v. Wintman*, 234 Mass. 248. In any event, the plaintiff, as the person in possession of the note with the assent of her husband, may maintain this suit thereon. R. L. c. 73, § 68. *National Pemberton Bank v. Porter*, 125 Mass. 333, 335. *Fay v. Hunt*, 190 Mass. 378. *Jump v. Leon*, 192 Mass. 511. *Perry v. Pye*, 215 Mass. 403, 410.

2. The "charging back" of the amount of the note to the account of the plaintiff's husband, who acted in her behalf, did not discharge the defendant. The transaction was not the payment of a note by a maker, joint promissor, stranger or volunteer and is clearly distinguishable from the principle of *Lee v. Field*, 9 N. M. 435, on which the defendant relies. It operated only to discharge the plaintiff's own liability to the company and she was remitted to her former rights as against all prior parties. R. L. c. 73, § 138. *Berenson v. Conant*, 214 Mass. 127, 130.

3. These considerations are decisive of all the defendant's requests for rulings. Inasmuch as the plaintiff was remitted to her former rights as "A holder in due course" it was not necessary for the judge to pass on the issue of fraud between the defendant and the payee. The finding in her favor was made properly. R. L. c. 73, § 74. *Symonds v. Riley*, 188 Mass. 470. *De Reisat v. Loughery*, 205 Mass. 86. The order of the Appellate Division of the Municipal Court dismissing the report must be affirmed.

So ordered.

DIRECTOR GENERAL OF RAILROADS *vs.* PEOPLES EXPRESS,
INCORPORATED, & others.

Suffolk. January 15, 16, 1920. — February 28, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & JENNEY, JJ.

*Railroad. Express Company. Carrier. Corporation, Officers and agents.
Contract, What constitutes. Agency, Existence of relation.*

A regulation, established by the Boston and Maine Railroad and continued in effect by the Director General of Railroads while in control of that railroad, which required of an express company, doing a local business upon trains of that railroad between Boston and Amesbury and Boston and Newburyport, that all shipments should be forwarded in baggage car service and that an express messenger must accompany each shipment and present for his personal transportation an express ticket, which differed from the ordinary season ticket only in the respect that it might be used by any person acting as messenger, was held to be reasonable and not in violation of the provisions of St. 1906, c. 463, Part II, §§ 196, 197.

The provisions of St. 1906, c. 463, Part II, §§ 196, 197, do not require that a railroad corporation should give to all persons, engaged in a local express business upon its trains under the conditions specified in § 197, absolutely equal terms, facilities and accommodations regardless of conditions, but require only that as to each such person such terms, facilities and accommodations as the railroad shall make shall be reasonable and equal in view of all the attendant circumstances and conditions.

A contract in writing recited that "Whereas, I, [naming the person whose signature was upon the contract] President of" a certain express company, "have made application for the privilege of doing an express business on the passenger trains of the Boston & Maine Railroad between" certain stations, that a receiver, who was operating the railroad, had granted "to me the aforesaid privilege," and "Now, Therefore, in consideration thereof, I do hereby covenant and agree as follows:" Then followed certain undertakings relating to indemnifying the receiver against claims "for damage to property carried by me under this agreement while on the premises of the railroad," and against claims for personal injuries, death or property damage made "by me or by my agents or servants" or "on account of my acts or omissions, or those of my agents or servants." There also was a further provision as to rules and regulations to be made and changed by the receiver, and as to termination of the contract after notice. The testimonium clause read: "In Witness Whereof, I have hereunto set my hand and seal," and it was signed without a seal by the president with his individual name. A master, to whom a suit involving the validity of the contract was referred, found, that the contract was signed as president of the corporation by one who was held out by the corporation and had acted as

its president, "and at the time he signed the contract was being so held out and acting," and that the corporation continued to do business under it. *Held*, that the contract was the contract of the corporation.

The contract above described contained a provision "That I will not ship or cause to be shipped any articles . . . unless accompanied by a messenger having an express ticket." The express company repeatedly and deliberately violated this provision. While in charge of the operation of the railroad corporation, in May, 1919, the Director General of Railroads notified the express company that all its privileges of doing business on the trains of the railroad were terminated. The express company refused to recognize the notice as binding. *Held*, that the Director General in a suit in equity was entitled to a decree enjoining the corporation from further use of the lines of the railroad in question.

In the same suit, the express company filed a cross bill seeking a mandatory injunction compelling the Director General to permit it to use the railroad in the course of its business, contending that the regulations in question were discriminatory and unfair to it. In dismissing the cross bill, this court did so without prejudice to the right of the express company, if any, to apply to the Department of Public Utilities for a revision of the regulation, if so advised.

BILL IN EQUITY, filed in the Supreme Judicial Court on July 16, 1919, by the Director General of Railroads, against Peoples Express, Incorporated, a corporation carrying on the business of transporting express matter between Boston and Newburyport and Boston and Amesbury on the lines of the Boston and Maine Railroad, Charles J. McCarthy, alleged to be the treasurer of that corporation and "actively engaged in its management and operation," and Howard J. Pike, alleged to be an employee of that corporation. The prayers of the bill in substance were that the defendants be enjoined from conducting the express business of the corporation over the lines of the Boston and Maine Railroad because of violations of reasonable rules and regulations of the plaintiff and of the contract between the plaintiff and the defendant corporation; also a

CROSS BILL OF COMPLAINT, filed on July 18, 1919, and afterwards amended, by Peoples Express, Incorporated, alleging unreasonable and illegal interference by the Director General with the conduct of its express business, and seeking a mandatory order "which shall secure to it the privilege of doing its express business on the passenger trains of the" railroad "upon terms and with facilities and accommodations which shall be reasonable and equal to those furnished to other companies doing business over the . . . railroad."

The defendant Pike, previous to the filing of the bill of complaint,

had ceased to be an officer of or a stockholder in the defendant corporation.

The bill and cross bill were referred to a master. It appeared that, for a period beginning at least as far back as the year 1880, the railroad company had established rules and regulations governing the conduct of local express business, which rules and regulations were known to and had been complied with by all persons and companies doing local express business on this line or system. Among those rules and regulations were the following: "All shipments will be forwarded in baggage-car service and must be delivered to Station Baggage Master sufficiently in advance of train time to be properly weighed and way-billed. Express Messenger must accompany each shipment and present an Express Ticket to cover his personal transportation."

The material portions of the contract between the receiver of the Boston and Maine Railroad and the defendant corporation were as follows:

"Whereas, I, Howard I. Pike, President of Peoples Express have made application for the privilege of doing an express business on the passenger trains of the Boston & Maine Railroad between stations outlined below and

"Whereas, J. H. Hustis, Temporary Receiver of the said Boston and Maine Railroad, in so far as he lawfully may, has granted to me the aforesaid privilege, together with the usual facilities for doing such business, the use and enjoyment of which is hereby acknowledged,

"Now, Therefore, in consideration thereof, I do hereby covenant and agree as follows:

"1. That I will not ship or cause to be shipped any articles unless properly weighed and billed by the proper railroad employes, and unless accompanied by a messenger having an express ticket, the form of which is attached hereto, and that all such property shall be handled by me or by my agents or servants at both ends of the route.

"2. That I will indemnify and hold harmless said J. H. Hustis, Temporary Receiver, and the Boston and Maine Railroad, their successors or assigns, against any and all claims for damage to property carried by me under this agreement while on the premises of the railroad and against any and all claims for property damage,

injury to or death of any person, which may be made by me or by my agents or servants, for accidents occurring while on the premises of the railroad under the terms of this agreement; also against any and all claims which may be made on account of my acts or omissions, or those of my agents or servants, while on the premises of the railroad under the terms of this agreement.

"It is understood and agreed that the methods and regulations regarding express traffic may be changed by the said J. H. Hustis, or by the Boston and Maine Railroad, their successors or assigns, as they see fit, and I hereby agree to conform to such methods and regulations. It is further agreed that contracts may be made covering express traffic to any and all of the stations of the railroad and that the aforesaid privilege which has been granted me may be terminated at any time by thirty (30) days' notice in writing given by said J. H. Hustis, or by his successors, of intention to terminate.

"In witness whereof, I have hereunto set my hand and seal this second day of January 1918.

Boston & Amesbury

Boston & Newburyport

Boston & Ipswich

Ipswich & Newburyport

[Signed] Howard I. Pike"

"witness: —

Walter S. Bean"

The master's findings as to this contract were as follows:

"In January, 1918, because the Boston and Maine Railroad was in the hands of a receiver, the receiver, in the fall of 1917, prepared a uniform form of contract and caused it to be presented to all local expressmen and companies for signature. There are eighteen such persons and companies.

"This contract was in the form previously existing, with the addition of a new provision that any express privilege might be terminated by the receiver at any time upon thirty days' notice given by him in writing. . . .

"This new form of contract had been presented to, and signed by, one Howard I. Pike as president of the Peoples Express Company, on January 2, 1918, and the company continued to do business under it.

"There was contention by the defendant that said Pike was not in fact president of the company and had never been duly elected to that office; also that his act in signing the contract was void and *ultra vires*, as the matter of the contract had not been considered or passed upon by the directors of the company. The records of the company were not produced, and it was said none could be found bearing on Pike's election. A copy of the by-laws was produced, which provided that the president and treasurer should jointly sign all formal documents.

"It appeared in evidence, however, that he was held out by the company and had acted as president, and at the time he signed the contract was being so held out and acting, and I so find and report."

Other material findings of the master and exceptions to his report are described in the opinion. The exceptions were heard by *Carroll, J.*, by whose order interlocutory decrees were entered overruling the exceptions, confirming the report and reporting the case for determination by the full court.

St. 1906, c. 463, Part II, §§ 196, 197, are as follows:

"Section 196. Every railroad corporation shall, subject to the provisions of section two hundred and one, give to all persons reasonable and equal terms, facilities and accommodations for the transportation upon its railroad of themselves, their agents and servants, and of their merchandise and other property and for the use of its depot and other buildings and grounds; and, at any point where its railroad connects with another railroad, it shall give reasonable and equal terms and facilities of interchange.

"Section 197. The provisions of the preceding section shall apply to all persons engaged only in a local express business for the forwarding of express matter between points within the Commonwealth in the trains or cars of any railroad corporation, and to persons desiring to engage therein who obtain the recommendation of the board of railroad commissioners therefor, and who agree in writing to indemnify the corporation against all loss of and damage to any property which is carried by them on its trains. Such recommendation shall be given only after notice to all parties interested and a hearing thereon, and with regard, among other considerations, to the public interest. Such corporation may contract with one or more persons for the express service over its railroad or system, subject to the rights of such persons as may then

be engaged in, or shall have obtained the recommendation aforesaid to conduct, such local express business thereon between points within this Commonwealth under the provisions of this section; and the terms, facilities and accommodations provided for such last named persons shall not be unreasonable or unequal, having regard to the amount and character of the service and also to such reasonable regulation of said business as may be for the public interest and the efficient operation of the railroad. The provisions of this section shall not deprive any railroad corporation of any right which it has under its charter or under general laws, to perform all the transportation of property upon its railroad. The Supreme Judicial Court or the Superior Court shall have jurisdiction to enforce the provisions of this section by injunction, mandamus or other suitable process."

W. A. Cole, (F. N. Wier with him,) for the plaintiff.

J. H. Duffy, for the defendants.

DE COURCY, J. This bill in equity is brought by Walker D. Hines, Director General of Railroads, now operating the Boston and Maine Railroad under federal control, and asks that the defendants be enjoined from conducting a local express business between Boston and Newburyport, Amesbury or elsewhere on that railroad. The defendant Pike has no interest in the proceedings. The defendant McCarthy is manager and sole stockholder of the corporation. By reason of their identity of interest the defendants will be referred to collectively as "the defendant." The only traffic involved is that carried in passenger trains.

Among the rules and regulations established by the railroad corporation governing the conduct of local express business is the following: "Express Messenger must accompany each shipment and present an Express Ticket to cover his personal transportation." This differs from the ordinary season ticket only in the respect that it may be used by any person acting as messenger. The rule has been in effect for more than forty years, is well known, and is observed by all of the eighteen local express companies operating on this line or system. In May, 1919, the plaintiff's officials discovered that the defendant was not complying with this rule, but was making shipments unaccompanied by a messenger, and they notified said McCarthy of the fact. He steadily refused to comply; and on May 29 notice was duly served on the

defendant, to become effective July 1, terminating all the privileges of doing express business on the plaintiff's passenger trains.

Since that time the plaintiff has refused to recognize the defendant, and to sell messenger tickets to it. The defendant McCarthy has insisted on transporting express shipments of the company without complying with the rule as to a messenger; and he and its employees have placed its express matter in the cars by force and in defiance of the plaintiff's agents, who have tried to prevent them from so doing. Since July 1, 1919, McCarthy and employees of the defendant corporation also have been riding on the plaintiff's passenger trains without paying any fare, tendering a promise to pay on receipt "of the so called Expressman's ticket."

At the hearings before the master, the defendant contended that it was not required to comply with the rule, because it had acquired "vested rights" by purchasing certain "express franchises," so called, that had been granted prior to St. 1894, c. 469. If this contention is now pressed, it is disposed of by the findings of the master, one of which is that the purchaser of a business with a "franchise," when recognized by the railroad corporation, was given a franchise "subject to the requirements as to compliance with the rules and regulations," and another, that "... the 'rights' existing prior to the Act of 1894 were individual rights, granted upon condition that the rules and regulations were complied with, terminable upon failure to comply."

The main contention of the defendant seems to be, that the plaintiff is violating the letter and spirit of St. 1906, c. 463, Part II, §§ 196, 197, 201, in the making and enforcement of said rule, and for that reason cannot compel the defendant to comply with it. The statute (§ 197) contemplates that local expressmen who obtain the recommendation of the commissioners shall be provided with terms, facilities and accommodations that "shall not be unreasonable or unequal, having regard to the amount and character of the service and also to such reasonable regulation of said business as may be for the public interest and the efficient operation of the railroad." Plainly it is proper to provide that shipments of express matter on passenger trains should be in charge of a messenger, for the protection of the goods themselves, and for the prompt and convenient transportation of the passengers and their baggage, to which the express business on passenger trains is sub-

ordinate. *Sargent v. Boston & Lowell Railroad*, 115 Mass. 416. *Express Cases*, 117 U. S. 1, 23. The master reports: "If it is proper for me to pass upon it as matter of fact, I find and report that the rule is a reasonable one, and is based on the proposition that the railroad is to be protected from damage to the express matter of others in the same car by the express matter of the defendant, or by the negligence of the defendant's agents, and is not to be held liable to shippers of goods by express for anything except its own negligence, or held to have assumed any such liability." And manifestly the defendant cannot compel the railroad corporation to make its baggagemen act as messenger employees of the express company.

The alleged discrimination made by the plaintiff affords no justification for the defendant's refusal to comply with the long established rule as to messengers. The American Railway Express Company is not "engaged only in a local express business," but embraces the four large interstate express companies. Further, its contract with the plaintiff is an elaborate one of eight printed pages; it has large express cars attached to trains in which no express matter but its own is carried; and when it is permitted at times and on light runs to use the train baggagemen as its messengers, it pays them extra compensation, or reimburses the railroad corporation for their time. It competes with the defendant in the Newburyport business, but pays a rate of \$.412 per one hundred pounds as against \$.35 paid by the Peoples Express, Inc., for the same service. The other alleged violation of equality of treatment is in the case of Thompson's Express. As to this the master reports: "A company called Thompson's Express does a local business between Boston and Worcester. It does a very large business and has a contract with the railroad corporation under which it pays forty per cent of its gross receipts from its express business, instead of paying the railroad tariff per one hundred pounds. Its business is so large that it requires an express car of its own, which is placed in the station by itself, and into which the company loads its express matter directly without its being previously weighed or way-billed by the station baggage master. When loaded it is attached to a train and hauled to Worcester. It purchases a messenger's ticket and the messenger accompanies its shipments. Its volume of business is such that it pays to the rail-

road an average of eight hundred dollars (\$800) a month, and the weight of its express matter is seven thousand (7000) to eight thousand (8000) pounds a day. The Peoples Express Company ships local express matter on passenger trains usually on Saturdays, although occasionally it ships on other days in the week; its average weight is less than five hundred (500) pounds and its average payment to the railroad varies from seventeen dollars (\$17) to thirty dollars (\$30) a month."

The statute does not require absolute equality, regardless of conditions. The terms and accommodations provided must not be unreasonable or unequal, "having regard to the amount and character of the service and also to such reasonable regulation of said business as may be for the public interest and the efficient operation of the railroad," in the language of the statute. See *Spofford v. Boston & Maine Railroad*, 128 Mass. 326. The master has found: "31. In view of the comparative amount of business of the different expresses doing business on the Boston and Maine Railroad and all the surrounding circumstances, the plaintiff gives to all such expresses reasonable and equal terms, facilities, and accommodations." *Manufacturers Railway v. United States*, 246 U. S. 457, 481. *State v. Central Vermont Railway*, 81 Vt. 463.

On the findings of the master, the defendant's contentions, both in its answer and cross bill, might well be disposed of by saying that its only right to conduct a local express business was under its contract of January 2, 1918, and that this contract has been properly terminated. The agreement was "signed by, one Howard I. Pike as president of the Peoples Express Company, on January 2, 1918, and the company continued to do business under it." As to the contention that Pike was not in fact president, the master finds that "he was held out by the company and had acted as president, and at the time he signed the contract was being so held out and acting." *Hartford v. Massachusetts Bowling Alleys, Inc.* 229 Mass. 30. *Beacon Trust Co. v. Souther*, 183 Mass. 413. The contract was in the form previously existing, with the addition of a new provision, (inserted in the uniform contract prepared by the receiver, Mr. Hustis,) that it might be terminated by the receiver at any time upon thirty days' written notice. This clause need not be considered, as it is not material in the present case. One of the stipulations was, "That I will not ship or cause to be

shipped any articles . . . unless accompanied by a messenger having an express ticket, the form of which is attached hereto. . . ." In view of the deliberate and repeated breaches of this provision, the plaintiff was justified in terminating the contract as he did. *Ballou v. Billings*, 136 Mass. 307.

What has been said disposes of the defendant's material exceptions, aside from those taken to the master's findings or refusal to find, which we cannot review in the absence of the evidence. The right to conduct a local express business between Boston, Hamilton, Wenham and stations on the Essex branch, and on the so called Georgetown branch, claimed in the cross bill, has been abandoned if it ever existed, — according to the master's findings. Evidence as to the rules and regulations in force on the New York, New Haven, and Hartford system was rightly excluded as immaterial to the issues in this case.

The bill is to be dismissed as to Howard I. Pike., In view of the conduct of the other defendants in persistently placing shipments on trains by force, and against the physical opposition of the plaintiff, and in having the employees of the express company ride on trains without paying any fares, an injunction is to issue in conformity with the second and third prayers of the plaintiff's bill, but confined to the Boston and Maine Railroad system, and with costs. *Boston & Maine Railroad v. Sullivan*, 177 Mass. 230. 13 L. R. A. (N. S.) 173, note. The cross bill must be dismissed; but without prejudice to the right, if any, of said defendants to apply hereafter to the Department of Public Utilities, successor of the public service commission, if so advised.

Ordered accordingly.

ALBERT K. TAPPER & others vs. BOSTON CHAMBER OF
COMMERCE & others.

Suffolk. January 19, 1920. — February 28, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

*Boston Chamber of Commerce. Equity Pleading and Practice, Bill. Corporation,
By-laws, Officers and agents.*

A bill in equity by individual "certificate holding members" of the corporation, Boston Chamber of Commerce, brought in their own behalf and in behalf of others, similarly situated and entitled, who might be permitted to join as plaintiffs, against that corporation, its officers, board of directors and the board of trustees constituted under the provisions of St. 1914, c. 82, amending the charter, St. 1909, c. 251, by adding a new § 21, is not multifarious if its main object is to restrain the trustees from making what, it is alleged in the bill, would be an illegal purchase of additional certificates of membership in the corporation and from voting at corporation meetings upon certificates already held by them, and if every officer of the corporation and trustee is joined as a defendant in order that each and all of them in their respective capacities may be enjoined from doing or consenting to the doing of any act which, conjunctively with acts of any one or of others of them, might attain the result which it is the main purpose of the bill to prevent.

Upon a demurrer to the bill above described, an allegation in the bill that a vote of the directors of the defendant corporation, which purported to authorize the purchases of shares declared by the plaintiffs to be illegal, was passed "by a board of directors" of which eight members, who were named, were "ineligible to vote upon matters affecting the management of the property of the corporation," in the absence of an allegation that the eight named members were present or, being present, voted with the other members of the board, was held not to contain an allegation showing that the vote was illegal because it was participated in by persons having no authority to do so.

The Boston Chamber of Commerce is not a business corporation.

The charter of the Boston Chamber of Commerce, St. 1909, c. 251, provided for two classes of members, certificate holding members and other members, and that such members other than certificate holding members should "have equal voting power with the certificate holding members, except in matters affecting the management of the property" of the corporation. The by-laws provided for a board of directors consisting of "members," part of whom should be elected at each annual meeting for a three year term by the "members." There was no provision restricting the right to vote for directors to certificate holding members or that only certificate holding members might be directors. Upon a demurrer to a bill in equity which called in question the legality of a vote of the board of directors affecting the property of the corporation on the ground that some members of the board were not certificate hold-

ing members of the corporation, it was *held*, that such members of the board had a right to vote as directors upon matters affecting the management of the property of the corporation.

The charter of the Boston Chamber of Commerce, St. 1909, c. 251, provided that certificate holding members should be entitled to but one vote, although they temporarily might hold as many as five certificates. In order to effect the incorporation, certain members temporarily subscribed for certificates in excess of one to a member, which were called "excess certificates," and St. 1914, c. 82, afterwards was enacted to provide for taking their excess certificates off "their hands," and provided for the establishment of a trust and the election, by the board of directors of the corporation, of trustees and that the money appropriated for the trust "shall be used to purchase the outstanding certificates of the new corporation, or, under the direction of the board of directors, may be invested in other ways. . . . The trustees . . . shall have the power to hold an unlimited number of the certificates of the corporation." *Held*, that the statute empowered the trustees, under the direction of the board of directors, to acquire and hold in the trust fund, besides the "excess certificates," certificates of membership however classified.

The new § 21, added to the charter of the Boston Chamber of Commerce by St. 1914, c. 82, also granted to the trustees, above described, "the power to hold an unlimited number of the certificates of the corporation, and to vote the same and to receive dividends or interest upon the same, any provision of this charter or of the general law to the contrary notwithstanding." *Held*, that it was the duty and personal obligation of the trustees to vote the certificates with sound judgment and a wise regard for the general benefit of the corporation, and that, in the fulfilment of that obligation and the performance of that duty, they were not controlled by the corporation or by its board of directors.

A bill in equity by certificate holding members of the Boston Chamber of Commerce, calling in question the right of the trustees, constituted under § 21, added as an amendment to the original charter of the corporation by St. 1914, c. 82, to vote on all stock held by them, contained nothing to warrant even an inference that any vested right of any certificate holding member under the charter of 1909 was impaired without right by the amendment, and, upon a demurrer to the bill, it was *held*, that the amendment, which gave to the trustees "the power to hold an unlimited number of the certificates of the corporation, and to vote the same . . . any provision of this charter or of the general law to the contrary notwithstanding," was valid and that the trustees might vote such certificates at all meetings of the corporation, including those where only certificate holding members were entitled to vote.

BILL IN EQUITY, filed in the Superior Court on January 13, 1919, and afterwards amended, by twenty-eight certificate holding members of the corporation, the Boston Chamber of Commerce, who alleged that they brought the bill for themselves and such others, "similarly situated" and entitled, as might thereafter be admitted to join them, against that corporation and thirty individuals, including the president, the treasurer, the secretary and the members of the board of directors of the corporation, including by

name the members of the board's financial and executive committees, and the members of the board of trustees elected by the board of directors under the provisions of St. 1914, c. 82, which added to the original charter § 21, hereinafter described, seeking to restrain the purchase by the trustees of certificates of membership beyond those then held by them and from voting at corporation meetings upon those which they already held.

The defendants demurred to the amended bill. The allegations of the bill and the grounds of the demurrer are described in the opinion. The demurrer was heard by *Chase, J.*, and was sustained; and a final decree was entered dismissing the bill. The plaintiffs appealed.

Material portions of St. 1909, c. 251, § 13, referred to in the opinion, are as follows:

"The new corporation by concurrent vote of a two thirds majority of both certificate holding and other members present and voting at separate meetings called for this specific purpose, notice of which meetings shall be mailed to each member not more than fifteen or less than ten days in advance, shall have the right, upon the payment of the sum of two hundred dollars and accrued interest to each certificate holder to cancel and retire all outstanding certificate-holding memberships, upon such terms and conditions as shall be determined by said two thirds majority vote. In the event of the exercise of such right of cancellation there shall be thenceforth but one form of membership in said corporation, and each member, whether previously a certificate holding or other member, shall receive a certificate representing the same individual interest in all the property, rights and privileges of the new corporation. . . ."

H. H. Pratt, for the plaintiffs.

G. R. Nutter, for the defendants.

PIERCE, J. This is a suit in equity brought by the plaintiffs, each a certificate owning and holding member of the Boston Chamber of Commerce, a corporation, for themselves and such others as may be similarly situated and entitled who may be admitted to join as plaintiffs, against the Boston Chamber of Commerce, the officers and the board of directors of that corporation, and the board of trustees elected by the directors of the corporation to administer a trust fund created by the board of directors under

the authority of St. 1914, c. 82. The bill alleges the following facts:

The Boston Chamber of Commerce and the Boston Merchants Association were authorized to unite and form one corporation under the name of the Boston Chamber of Commerce, and thereafter became such by the authority of St. 1909, c. 251. The Boston Chamber of Commerce owned real estate, the Boston Merchants Association owned no real property. Under the charter, the members of the old Chamber of Commerce each held a certificate entitling the holder to a proportional share in the real estate and other property of the corporation. The charter, also, provided for another class of members than those holding certificates; and further provided that "Such members shall be liable only for the same annual dues as are levied upon certificate holding members, and shall have no interest in the real estate, or other property of the new corporation; they shall, however, have equal voting power with the certificate holding members, except in matters affecting the management of the property, real or personal, owned by said corporation, but shall have equal rights with certificate holding members to use and enjoy the same; and they shall also have all other rights and privileges of certificate holding members, save as aforesaid. . . ." The by-laws of the corporation provide that the board of directors shall consist of twenty-three members elected at annual meetings "as hereinafter provided." Certain individual defendants, eight in number, were chosen as members of the board of directors, and none of them was an owner or certificate holder when the acts and things were done that the plaintiffs complain of.

The charter provided that the "new corporation shall consist of not more than two thousand individual certificate-holding members . . . and such number of other members as may be fixed by the by-laws. . . . Certificates . . . shall have a par value of two hundred dollars. . . . No person shall be the permanent holder of more than one certificate, but the corporation by appropriate by-laws may provide for the temporary holding by individual members of not more than five certificates, but members holding more than one certificate shall be entitled to but one vote and shall not be obliged to pay dues on more than one certificate standing in their name; *provided, however*, that upon and after the first

transfer of any such surplus certificates to any person other than the executor, administrator or trustee of the temporary holder thereof, each of such certificates so transferred shall be liable for all regular assessments." The charter also provided that each certificate holder of the old Chamber of Commerce should be entitled to receive a certificate of membership in the new corporation; and that the members of the Boston Merchants Association should be entitled to become certificate holding members upon certain conditions.

At the time of the incorporation of the defendant corporation, certain individual members for the purpose of complying with the provisions of the new charter and that it might become operative, temporarily subscribed for and purchased six hundred and fifty certificates of membership in the corporation in excess of those which they might severally hold under the charter. These certificates of membership were denominated and called "excess certificates." These "excess certificates" so subscribed for and purchased were held, in whole or in large part, by said individual members for a period of approximately four years. In the year 1914, in order that those owners who had purchased the "excess certificates" for a specific and temporary purpose only might be reimbursed for this outlay and the "excess certificates 'taken off their hands,'" the then directors petitioned for legislation enabling the corporation to establish a trust fund by means of which the "excess certificates" might be purchased from the individual holders. Later, by St. 1914, c. 82, (now embodied in § 21 of the original act,) the board of directors were empowered to establish a trust, and a board of administration of the trust to consist of three trustees who should be elected and who should hold office for the term and purposes therein set forth. Section 21 reads as follows:

"The board of directors of the new corporation shall have the power and is hereby authorized to establish from the available funds or property of the corporation a trust fund for the general benefit of the corporation. This fund shall be administered by a board of three trustees elected by the board of directors as hereinafter provided. Upon the establishment of the said trust fund the directors shall elect one trustee for the term of one year, one trustee for the term of two years, and one trustee for

the term of three years, to hold office until their successors are elected and qualified. Each year thereafter the directors shall elect one trustee for the term of three years, to hold office until his successor is elected and qualified. If any vacancy occurs in said board of trustees by resignation or otherwise, the board of directors at any regular or special meeting, may elect trustees to fill unexpired terms, but in the meantime the remaining trustee or trustees, if any, shall exercise all the powers of the board of trustees. The money or property appropriated for this fund shall be used to purchase the outstanding certificates of the new corporation, or, under the direction of the board of directors, may be invested in other ways. The trustees of the trust fund so created are empowered to receive gifts and bequests and to add the same to the fund. The income from the fund shall be paid annually or oftener into the general treasury of the chamber, and shall be treated in the same way as money coming from the payment of membership dues. The trustees of the said fund shall have the power to hold an unlimited number of the certificates of the corporation, and to vote the same and to receive dividends or interest upon the same, any provision of this charter or of the general law to the contrary notwithstanding. The trustees shall have power under the direction of the board of directors to change investments and to sell any property held by them in the trust fund, and to reinvest the proceeds, and to reissue the certificates of membership in the new corporation held by them, and to reinvest the proceeds thereof, and any purchaser of such certificates shall have the same rights, privileges and duties as if the said certificates were issued to him originally by the new corporation. In the event of liquidation, dissolution or distribution of the property of the new corporation, the trustees of the trust fund herein created shall receive their proportionate share of the sum or sums distributed among the certificate-holders, based on the number of certificates held by them. . . .” Pursuant to said statute and power the board of trustees purchased all “excess certificates” and placed them in the trust fund.

On December 18, 1918, the defendant directors passed the following vote:

“Voted to instruct the trustees of the trust fund to buy additional certificates of membership in the Chamber, at a price not

in excess of \$100 per certificate, out of the income of the trust fund."

Notwithstanding the fact that there were no outstanding "excess certificates" the defendant trustees, acting under the supposed authority of the above vote, "have bargained for and are about to complete the purchase of a large number of certificates of membership in said corporation." The vote was passed and the appropriations were made by a board of directors of the corporation, of which eight are members ineligible to vote upon matters affecting the management of the property of the corporation. On or about March 1, 1918, the corporation, in consideration that the certificate holders would arbitrate certain differences existing between the corporation and them, agreed that the trustees of the trust fund under § 21 of the charter should not vote in any manner the certificates held by them. In alleged violation of this agreement the defendant corporation threatens to cause these trustees to vote the certificates held in said fund, upon the question of exchanging them for second mortgage bonds to be issued by the corporation, upon the question of making costly additions to the real estate of the corporation, and upon other questions. The plaintiffs pray:

"1. That the defendants the trustees of the trust fund may be restrained and enjoined from making or completing any further purchases of certificates of membership in said corporation for or to be added to said trust fund.

"2. That the defendant Edward J. Frost, treasurer, may likewise be restrained and enjoined from paying any money of the corporation for this purpose.

"3. That the certificates of membership in said trust fund, other than the so-called 'Excess Certificates' purchased in the years 1914 and 1915, now held in said trust fund, be retired and cancelled.

"4. That the defendants, the President, Secretary and General Manager, Directors, Executive Committee and Finance Committee be severally restrained and enjoined from making any appropriation of the funds of the corporation for the purpose of further or additional purchases of the certificates of membership in the corporation for said trust fund and from authorizing or directing any vote or votes to be cast by the trustees of the trust fund upon those certificates now held in said trust fund.

"5. That the defendants, the trustees of the trust fund, be severally restrained and enjoined from casting any vote or votes as trustees of said fund upon any question in the determination of which they represent the certificates so held by them.

"6. And for such further and other relief as to this court shall seem meet and as justice and equity may require."

The defendants demurred to the bill as originally filed and as amended, and for causes thereof assigned reasons which in general are that the bill has no equity, that it is multifarious, that the vote of the directors is not invalid, that the further purchase of certificates of membership is authorized by § 21 of the charter, that the trustees are not bound by any agreement or instructions of the board of directors or of the chamber itself, and that the trustees have the right to vote the certificates at any meeting, under § 13 of the charter, and at any meeting at which the certificate holders have a right to vote as distinct from the other members of the chamber. The demurrers were sustained, and the case is before this court on an appeal from a final decree dismissing the bill. We shall consider the assignment of causes in the order followed in the defendants' brief.

1. That the bill is multifarious. The defendants contend in support of this position that the bill embraces distinct matter affecting distinct persons who have no common interest in the distinct matter alleged in the bill, and cite in support thereof *Metcalf v. Cady*, 8 Allen, 587, 589; while the plaintiffs argue that it is not indispensable that all parties should have an interest in all matters contained in the suit, — it is sufficient if each party has an interest in some matters in the suit and that they are connected with others, and cite *Lenz v. Prescott*, 144 Mass. 505, 513. The main object of the bill is to restrain the trustees from purchasing for and adding to the trust fund additional certificates of membership in the corporation, and from voting the certificates already held in that fund. To this end the charges of the bill and the prayers for relief are framed and designed to reach and embrace each officer and each trustee of the defendant corporation, and to enjoin each and any of them in their respective capacities from doing any act or consenting to the doing of any which, conjunctively with the doing of other acts and things by other officials, may result in the acquirement of additional certificates for the fund or the voting upon cer-

tificates now held in the trust fund. We think it plain that a single bill, wherein all persons are joined who have any interest in the purchase of certificates of membership for the trust fund or in the right to vote certificates held and to be held in that fund, will afford a more adequate and efficient form of relief than several bills against several persons who individually or officially are directly interested in a part only of the relief sought against all the defendants.

2. The defendants next contend that the vote of the board of directors on December 18, 1918, was legal notwithstanding the admitted fact that eight members of that board were ineligible to vote as members of the corporation upon matters affecting the management of the property, real and personal, owned by the corporation. By the by-laws of the corporation, "The board of directors shall consist of twenty-three members elected as hereinafter provided, and such officers as are *ex-officiis* members of the board." The bill does not allege that the eight members of the board who are ineligible to vote upon matters affecting the management of the property of the corporation, were present or, being present, voted with other members of the board. The by-laws provide that a majority of the board shall constitute a quorum. If the vote of the eight members would be illegal because they were not certificate holders, it must be assumed as a presumption of fact that they did not vote; and that the vote as passed was the vote of the majority of a quorum of certificate holders. The defendants do not rest upon the presumption of the legality of the vote of the board of directors, but argue that the action of the board was not illegal even if the presence and vote of the eight members were necessary to the passing of the vote. At common law a director in a corporation or association need not own stock. *Wight v. Springfield & New London Railroad*, 117 Mass. 226. By St. 1903, c. 437, § 18, a director of a business corporation must be a stockholder. The Boston Chamber of Commerce is not a business corporation nor does it carry on any business for profit. The charter provides that "The officers of the new corporation shall consist of . . . a board of directors . . . as may be determined by the by-laws." The by-laws provide that the "board of directors shall consist of twenty-three members," and that at each annual meeting "the members shall elect, to serve for the term

of three years, and until their successors are elected and qualified, either seven or eight directors, according to the number whose terms expire on that date." There is no provision that all members may not vote for directors, nor is the holding of certificates of membership made an essential factor to the qualification to membership in the board of directors. Membership alone, as distinguished from membership with a property right in the property of the corporation, is the status under the charter and by-laws, without which a person may not be a director. There is no allegation that the eight individual defendants named as ineligible to vote are not members of the corporation. The provision in § 12 of the charter that "other members than those holding certificates . . . shall, however, have equal voting power with the certificate holding members, except in matters affecting the management of the property," concerns the action or vote of members in their individual capacity, and does not import that such members shall not vote in matters affecting the management of property in their official capacity as agents or directors of the corporation. The bill does not allege and it is not argued that the defendant trustees are not a legal board of trustees if the board of directors which elected them was itself legally constituted.

3. The defendants next contend that the board of trustees are authorized by § 21 of the charter to purchase certificates other than so called "excess certificates." On the other hand the plaintiffs contend that the authority of the trustees is limited to the purchase of outstanding certificates, i. e. "excess certificates" held by certificate holders in excess of individual certificates of membership. We think the plaintiffs' construction of § 21 is too narrow; that section of the charter applicable to the question reads: "The money or property appropriated for this fund shall be used to purchase the outstanding certificates of the new corporation, or, under the direction of the board of directors, may be invested in other ways. . . . The trustees of the said fund shall have the power to hold an unlimited number of the certificates of the corporation." In the absence of a forbidding statute, a Massachusetts corporation may purchase its own stock, *Leonard v. Draper*, 187 Mass. 536, and it is not argued that this corporation or the trustees, under the statute, were not authorized by the statute to purchase at cost the "excess certificates." We think the statute

conferred authority upon the trustees to acquire under the direction of the board of directors and hold in the fund certificates of membership however classified, and that the right is not limited to a "power to receive an unlimited number of certificates" only by gift or bequest, and to add them to and to hold them in the fund.

4. The defendants next contend that the trustees are not bound in their voting of the certificates by any agreement or instructions of the board of directors or of the chamber itself. The charter grants to the trustees "the power to hold an unlimited number of the certificates of the corporation, and to vote the same and to receive dividends or interest upon the same, any provision of this charter or of the general law to the contrary notwithstanding." By reason of the power to vote the certificates, a duty is imposed on and an obligation is assumed by the trustees to vote the certificates so far as they are a part of the trust fund "for the general benefit of the new corporation." By reason of this provision of the charter, if not otherwise, the trustees are not mere depositaries of the funds of a naked trust, but have the active duty of voting the certificates with sound judgment and a wise regard for the general benefit of the corporation. This duty is a personal obligation, which may not be delegated and cannot be controlled by the corporation or by the board of directors.

5. The defendants further contend that the trustees of the trust fund have the right to vote the certificates of membership at any meeting, under § 13 of the charter, and at any meeting at which the certificate holders have a right to vote as distinct from other members of the corporation. In the absence of an express statute conferring the right, it is elementary law that a corporation cannot directly vote upon its own stock, or indirectly vote upon it through trustees who hold such stock for the use and benefit of the corporation, thus disturbing the voting equilibrium subsisting among its stockholders. *American Railway-Frog Co. v. Haven*, 101 Mass. 398. But the right is expressly conferred on the trustees of the trust fund by St. 1914, c. 82, as an amendment to the charter rights granted by St. 1909, c. 251. There is nothing in the bill to show that any or all of the certificate holding plaintiffs acquired their certificates before the

amendment to the charter, or that he or they did not request legislation or assent to the change in the charter affected by St. 1914, c. 82.

There is nothing in the bill or in St. 1914, c. 82, to warrant even an inference that any vested right of any one of the plaintiffs as a certificate owner under the charter of 1909 was without right impaired by St. 1914, c. 82, passed in amendment of the charter and of St. 1909, c. 251.

Decree affirmed with costs.

J. RANDOLPH COOLIDGE & another *vs.* AUGUSTUS P. LORING,
trustee, & others.

Suffolk. January 19, 1920. — February 28, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, & JENNEY, JJ.

Trust, Reformation of instrument. Equity Jurisdiction, To reform instrument in writing, Mistake. Mistake. Equity Pleading and Practice, Agreed statement of facts.

Misconception of the legal effect of the language used in a declaration of trust is not a "mistake of law" entitling the settlor to maintain a suit in equity to reform the instrument.

A statement, in an agreed statement of facts in a suit in equity brought by the settlors to reform a declaration of trust so that it would permit them to terminate it by a surrender of their interests to the remaindermen in their lifetime, that "there was no intention on their part to create interests which would prevent an immediate distribution in the event of such a surrender," falls short of indicating that the settlors had an intention not to create such interests.

An instrument will not be reformed on the ground of mistake except upon full, clear and decisive proof of the mistake.

A declaration of trust which placed upon the trustees important contractual duties and responsibilities will not be reformed by reason of a mistake in which it is not shown that the trustees participated.

A declaration of trust by a husband and his wife provided for three trustees, one of whom was one of the settlors, and that the income of the trust fund should be paid to the settlors and to the survivor of them for life and that upon the death of such survivor the trust fund should be distributed among such of the settlors' sons as were then living and the next of kin of such as should have died. It contained no provision for an earlier termination of the trust. The settlors brought a bill in equity to reform the instrument so that it would permit them to terminate the trust by a surrender of their life interests to the remaindermen, alleging that it was their intention that the contingent remainders should be

subject to the condition that they should not vest if the interest of the settlors, previous to the death of the survivor of them, should have been released by them, and that appropriate language to express that intention was omitted from the instrument through mistake. All living persons of adult age interested in the trust assented to the granting of the prayer of the bill. A guardian *ad litem* represented the interests of minors and persons not in being. The suit was heard upon an agreed statement of facts, which recited that it was the belief of the settlors "that they had the power to terminate the trust at any time by surrender of their life interests to the remaindermen, and there was no intention on their part to create interests which would prevent an immediate distribution in the event of such a surrender." Nothing appeared as to the intentions or beliefs of the trustees other than that of one of the settlors who also was a trustee. *Held*, that the suit could not be maintained.

BILL IN EQUITY, filed in the Supreme Judicial Court on December 10, 1919, and afterwards amended, by J. Randolph Coolidge and Julia Coolidge, his wife, settlors under a declaration of trust, against the trustees and all beneficiaries thereunder.

By an interlocutory decree, a guardian *ad litem* and next friend was appointed, to represent all of the defendants who were minors and all persons not ascertained or not in being who were or might become interested in the suit.

The material facts, which were agreed upon, are stated in the opinion. The suit was heard upon the pleadings and the agreed statement of facts by *Carroll, J.*, who ordered a decree dismissing the bill and reported the case for determination by the full court.

J. Noble, (*J. R. Coolidge* with him,) for the plaintiffs.

E. A. McLaughlin, Jr., for the defendant *J. Randolph Coolidge, Jr.*, and others.

H. W. Edgerton, for the guardian *ad litem*.

DE COURCY, J. This is a suit in equity to reform a declaration of trust. The plaintiffs are the settlors. The parties defendant are the trustees, the children, grandchildren and great-grandchildren of the settlors, and the wives of their four married sons. Together they constitute all the living persons who may be interested in the trust. The defendants who are minors, and persons not yet in being who may become interested, are represented by a guardian *ad litem*.

The trust was created in 1907 by the conveyance by the settlors of real estate and securities to the trustees, who executed, contemporaneously, the declaration of trust in question. This instrument declares that the property is to be held: "1st. In trust

to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge four sevenths ($\frac{4}{7}$) and three sevenths ($\frac{3}{7}$) respectively to each so long as they both live, and to pay the whole of said net income to the survivor; and upon the death of the survivor to distribute equally the trust property among the following persons who are children of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge Jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge and Julian L. Coolidge; and should any of said persons predecease the survivor of the said J. Randolph Coolidge and Julia Coolidge, to pay the share of the person so predeceasing to those who would be entitled to take his intestate property under the Statute of Distributions in effect at the time of the death of such survivor, provided that in no case shall a surviving widow take as distributee, more than one-half of said share."

The plaintiffs in 1917 assigned their life interests in the trust to their five sons, who shortly thereafter called upon the trustees for immediate distribution of the fund. The trustees have not acceded to the request, being advised that there might be a possible claim of a contingent interest on behalf of wives and children of sons predeceasing the plaintiffs.

The main prayer of the bill is that the declaration of trust be reformed by striking out the first article, above quoted, and substituting the following:

"1st. In trust to pay the net income of the trust fund to the said J. Randolph Coolidge and the said Julia Coolidge four-sevenths ($\frac{4}{7}$) and three-sevenths ($\frac{3}{7}$) respectively to each so long as they both live, and to pay the whole of said net income to the survivor, unless during their joint life times or that of the survivor, they shall have earlier assigned their rights to the said net income to the persons entitled to take the estate in remainder, and in case of such assignment the trusts in respect to the income of the fund shall forthwith cease, and the fund become distributable at once, irrespective of the date of the death of the settlors, — but in case no such earlier termination of the trust takes place, the trust shall continue until the death of the survivor of the said J. Randolph Coolidge and Julia Coolidge, and upon the death of such survivor the trust property shall be distributed equally among the following persons who are children

of the said J. Randolph Coolidge and Julia Coolidge, viz: J. Randolph Coolidge Jr., John Gardner Coolidge, Archibald Cary Coolidge, Harold J. Coolidge and Julian L. Coolidge, the share of any person who may predecease the time of distribution to be paid to the persons who would be entitled to take his intestate property under the statute of distributions in effect at the time of such distribution, provided that in no case shall a surviving widow take as distributee more than one-half of said share."

The trustees admit the facts alleged in the bill and submit without argument the questions presented for determination. The sons, daughters-in-law and adult grandchildren have filed answers consenting to the reformation prayed for. The guardian *ad litem* in his report admits the facts alleged in the bill, except as to the intentions and beliefs of the plaintiffs. The agreed statement of facts recites: "While meaning to make provision for their five sons named in the deed of July 29, 1907, as provided in that deed, so long as the trust established by them remained in full force and effect, it was their belief that they had the power to terminate the trust at any time by surrender of their life interests to the remaindermen, and there was no intention on their part to create interests which would prevent an immediate distribution in the event of such a surrender." Nothing appears in the record concerning the intentions or beliefs of the trustees, other than J. Randolph Coolidge, one of the plaintiffs, who was also one of the original trustees.

The plaintiffs recognize the rule that this voluntary and fully executed settlement cannot be revoked or altered in the absence of any provision in the instrument reserving such power to them. *Sewall v. Roberts*, 115 Mass. 262. *Sands v. Old Colony Trust Co.* 195 Mass. 575. They seek correction of the instrument on the ground of mistake, because of the alleged failure of the declaration of trust to express the intent which the parties had in making it. They contend that it was the intention of the settlors that the contingent remainders to their sons' distributees should be subject to the further condition that the settlors had not during their own lifetime released their life interests to their sons; and that appropriate language to express that intention was omitted by mistake. The entire support for this contention, in the agreed facts, is the statement above quoted.

It is unnecessary to discuss at length the doctrine of mistake of law with respect to reformation of instruments, and the various exceptions to the general rule. Confining ourselves to the present case, it is plain that the mistaken "belief" of the settlors as set forth in the agreed facts affords no ground for relief. Misconception of the legal effect of the language used in the instrument is not a "mistake of law" against which our courts afford a remedy. The parties are bound by the legal effect of what has really been agreed on, and cannot have the declaration set aside on the ground that they did not fully understand the legal effect of the language used, and that certain legal consequences which were not anticipated by the settlors flowed from its execution. *Taylor v. Buttrick*, 165 Mass. 547. *Wheaton Building & Lumber Co. v. Boston*, 204 Mass. 218. As to the statement that there was no intention on their part to create interests which would prevent an immediate distribution in the event of such surrender of the life interests, it seems to us as matter of interpretation that this negative statement of an intention that they did not have, falls far short of indicating that they had an intention not to create such interests. This is in the nature of a friendly suit, and presumably the statements in the agreed facts go to the limit of what the parties could agree upon. The language is entirely consistent with a view that the subject of surrender and termination in the lifetime of the settlors did not occur to the parties at the time of the declaration of trust. We find here no statement of affirmative intent to make the trust terminable. Indeed if such a positive intent then existed, one would expect in view of the legal skill and care with which the instrument was drawn that language appropriate to carry out that intention would have been inserted in the declaration of trust. *Keyes v. Carleton*, 141 Mass. 45, 50. *Lawrence v. Lawrence*, 181 Ill. 248. It is settled that an instrument will not be reformed on the ground of mistake, except upon "full, clear, and decisive proof" of the mistake. *Richardson v. Adams*, 171 Mass. 447, 449. *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290, 317. *Philippine Sugar Estates Development Co. Ltd. v. Philippine Islands*, 247 U. S. 385, 391.

It is also significant that the trustees who were parties to the instrument do not appear to have acted under any mistake or misunderstanding. It is argued on behalf of the plaintiffs that

the general rule, that the court will not afford its aid unless the mistake is common to both parties, is not applicable here. But we are not prepared to adopt the suggestion that the rule to be applied is that governing mistakes of scriveners in failing to express in the instrument the intentions of the parties thereto. It is enough to say that the trustees were not volunteers, and that they assumed important contractual duties and responsibilities as parties. "If a new term is to be added, or substituted for one in the writing, the minds of the parties must have met upon it." Story Eq. Jur. (14th ed.) 163.

While appreciating the considerations ably presented to the contrary, on the whole we are constrained to say that the decree of the single justice should be affirmed; and it is

Ordered accordingly.

JOHN H. BELYEA vs. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD COMPANY.

Suffolk. January 20, 1920. — February 28, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Negligence, Invited person, Railroad. Evidence, Of custom. Custom.

At the trial of an action against a railroad company for personal injuries caused by a bundle of newspapers, pushed from a baggage car by an employee of the defendant, falling upon the plaintiff, who was at the door of the car to receive the papers for his employer, there was evidence tending to show that, for a "year or so," daily, in accordance with a "system in vogue" when the plaintiff first entered upon the employment of receiving the papers from the defendant at that station, it was customary for the plaintiff to take a truck of the defendant, wheel it to where the baggage car of the defendant would stop, take the bundles of papers from the baggage car door, where the defendant's baggage master had piled them in tiers, and place them on the truck. *Held*, that the evidence warranted a finding that the plaintiff, when injured, was at the baggage car door with the rights of one invited by the defendant to be there.

TORT for personal injuries, received when the plaintiff, an employee of a corporation publishing a newspaper, was receiving bundles of newspapers from a baggage car of the defendant at the Harrison Square station of the defendant in Boston, and caused

by the baggage master pushing the bundles upon him. Writ dated March 28, 1917.

In the Superior Court the action was tried before *Callahan, J.* The material evidence is described in the opinion. The defendant rested at the close of the plaintiff's evidence and moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked for certain rulings, which are described in the opinion. The jury found for the plaintiff in the sum of \$325; and the defendant alleged exceptions.

A. W. Blackman, for the defendant.

H. R. Donaghue, for the plaintiff.

PIERCE, J. This is an action of tort to recover damages for injuries sustained by the plaintiff while receiving newspapers and magazines from the baggage master at the door of the baggage car of one of the defendant's trains at the Harrison Square station of the defendant in Boston on March 1, 1917. At the close of the plaintiff's evidence the defendant rested without submitting any evidence, and moved that a verdict be ordered for it. It also specifically requested rulings to the effect that the plaintiff was not an invitee, to do what he was doing, or to be in the position where he was at the time of his injury, but was at most no more than a mere licensee. The presiding judge refused to order a verdict for the defendant and refused to rule that the plaintiff was a mere licensee; but submitted to the jury as a question of fact the issue whether the plaintiff was a licensee or an invitee, with instructions, not excepted to, as to "the difference between the rights of licensees and invitees on the one hand, and the obligations of the carrier to licensees and invitees on the other hand."

The defendant concedes that the plaintiff had the right to enter upon the premises of the defendant for the purpose of receiving newspapers which the defendant was transporting for hire for the plaintiff's employer, but contends that he was not entitled by any invitation to come to, or to receive a delivery of the newspapers at the place of the accident, at the time of the accident. The evidence shows that it was the usage of the baggage master to pile the bundles of newspapers in tiers in the car door, and of the plaintiff and other newspaper drivers to take the papers from the car door and put them on a truck, which he or they had wheeled to a place about opposite the door of the baggage car, when the

train came to a stop. There was further evidence that for a "year or so" daily, in conformance to a "system in vogue" when he went there, the plaintiff took the papers from the car door and placed them on a truck. There is no evidence that any employee of the defendant ever received the papers for the defendant or after receipt took any step whatever to deliver them to the plaintiff or to any other person acting in behalf of the plaintiff's employer.

In these circumstances the jury would be warranted in finding as a fact that the defendant had knowledge of the "system" used by its employees in making deliveries of newspapers, and would be justified in finding an invitation to the plaintiff to receive the papers at the car door on the arrival of the trains, in the absence of evidence that the defendant objected to or forbade that form of receipt and delivery. It follows that the defendant owed a duty to the plaintiff to use ordinary care in making the deliveries and that the act of the baggage master in pushing the bundles out of the door on the plaintiff could be found to have been a negligent act.

Exceptions overruled.

EMMA S. ALMY vs. ALMY, BIGELOW AND WASHBURN,
INCORPORATED, & others.

Essex. January 21, 1920. — February 28, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, & JENNEY, JJ.

Corporation, Rights of minority stockholder. Equity Jurisdiction, Suit by minority stockholder in corporation. Equity Pleading and Practice, Bill.

A demurrer to a bill in equity by a minority stockholder, who also is one of eight directors of a Massachusetts corporation, against the corporation and the other seven directors, who include all the officers of the corporation, to enjoin the defendants from carrying out votes, passed by the seven defendant directors against the objection and vote of the plaintiff, discharging without legal consideration a debt owed to the corporation by one of the defendants and voting to all of the directors and officers except the plaintiff salaries in amounts which differed as to the different defendants but which in each case were excessive and unreasonable, and to compel an accounting by the individual defendants and a repayment of such excessive sums received by them, will be overruled

where, from the allegations of the bill, it appears that four of the seven individual defendants conspired with the other three to deprive and to defraud the plaintiff of her rights as a stockholder and adopted the votes in pursuance of that purpose.

The bill in equity above described was *held* not to be multifarious.

It was not necessary for the plaintiff, before commencing the suit above described, to apply to the corporation to bring suitable action against the individual defendants because it appears from the facts alleged in the bill and admitted by the demurrer that such application would have to be made to the defendants to take action against themselves and either would be futile and unavailing or would result in the authors of the wrong conducting litigation in the name of the corporation against themselves, which would be contrary to the established principles of justice.

From allegations in the bill in equity above described, it appeared that the plaintiff was present at the meeting when the objectionable votes were passed and that she protested and voted against them, and, within six months thereafter, brought the suit. *Held*, that the plaintiff showed proper diligence in asserting her rights.

The bill in equity above described was *held* under the circumstances not to contain matters which were immaterial and irrelevant and therefore in violation of R. L. c. 159, § 12, by reason of the inclusion therein of certain allegations relative to the history of the formation in 1899 of the defendant corporation from a partnership founded in 1858, to other business interests, activities and successes of the plaintiff, to a description of holdings of shares, preferred and common, of the individual defendants and the nature of their interests therein, to past activities of some of the defendants in common with the plaintiff which led to antipathy between them and furnished the motive for the defendants' alleged wrongful conduct, to the fact that one of the defendants was the president of a national bank where the corporation did a large business, and allegations to the effect that in the past the profits of the corporation had been paid, partly in dividends and partly in the form and under the guise of salaries to the large stockholders who owned and controlled substantially the entire issue of the common stock of the corporation.

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Essex on November 24, 1919, and afterwards amended, by a minority stockholder and a director of the Massachusetts corporation, Almy, Bigelow and Washburn, Incorporated, against the corporation and seven of its eight directors, seeking to enjoin the alleged improper discharge of a debt owed to the corporation by one of the defendant directors, and the payment of alleged unreasonable and excessive salaries to the defendant directors in accordance with a vote of the directors adopted on June 23, 1919, against the protest of the plaintiff.

Lucy A. Temple, another minority stockholder, was permitted to intervene as a party plaintiff.

The allegations of the bill material to a determination of its merits are described in the opinion.

The allegations objected to by the defendants as stated in the last ground of their demurrer, quoted below, were as follows:

(a) In the first paragraph a historical statement as to the foundation of the partnership of Almy, Bigelow and Washburn in 1858, its incorporation upon the death of the founder in 1899, the value of the shares of the surviving partners as then determined, and the number of shares of the corporation held by the parties plaintiff and defendant at the time when the bill was filed.

(b) In the same paragraph, allegations that the plaintiff was engaged in the department store business in Montreal, Canada, being a director and having the controlling interest in the corporation known as Almy's, Ltd., which owned and operated a very large and successful department store business in that city, and was also a director and third owner of the W. T. Grant Company, which maintained a chain of stores retailing merchandise throughout the country and doing a very large and successful business.

(c) In the fourth paragraph, allegations that the stock holdings in the defendant corporation of the defendant Sanborn, a son-in-law of the defendant Bigelow, the president and a director of the corporation and the active manager of the business, were twenty-five shares of the preferred stock, and that in 1919 he was made a director by votes of the other defendants.

(d) In the fifth paragraph, allegations that one half of the dividends on the seventy-five shares of common stock of the defendant corporation held by the defendant Helen J. Butler (who was a director), as a trustee under the will of James F. Almy, was payable to the plaintiff under the terms of his will and that her acts as set forth in the bill were in violation of her duty to the plaintiff under that trust.

(e) In the ninth paragraph, an allegation that the defendant corporation did a large business with the Merchants National Bank of Salem, whose president was the defendant Henry M. Batchelder, and that he had been a director of the defendant corporation for a long time.

(f) The allegations in the tenth paragraph objected to by the defendants are described in the demurrer.

(g) In the eleventh paragraph, allegations that the plaintiff, with the defendant Bigelow and the defendant Helen J. Butler, were heavily interested in a department store in Montreal known as the W. H. Scroggie Company, which company failed in business in the year 1914 and was subsequently reorganized by the plaintiff as Almy's, Ltd.; that the defendants Annable and Sanborn went to Montreal in 1915 and assisted in the management of the store for a brief period during the reorganization; that the defendant Warren H. Butler represented the interests of his mother as an attorney in this matter; that he made a claim for payment for his services at that time, which the plaintiff declined to contribute to in a general settlement of litigation over the matter, and that subsequently the defendants Sanborn and Annable made a substantial claim for additional compensation for their services, over and above substantial salaries which they had received; that this the plaintiff declined to recognize, and that thereupon the defendants, Warren H. Butler, Annable and Sanborn, conceived a feeling of hatred and dislike for the plaintiff with whom they had hitherto been on friendly terms, and formed the intention to deprive her of any share in the management of the business of the defendant corporation which she had hitherto had and to deprive her of her just returns in the form of dividends upon her stock.

The defendants demurred to the bill on the following grounds:

"1. That the plaintiff has not stated in her bill such a cause as entitles her to any relief in equity against these defendants.

"2. Because the plaintiff's bill is multifarious in that it appears therein that it is brought for distinct matters and causes which do not affect all the defendants alike, and which are not so related to each other as to be properly joined in the same bill of complaint.

"3. Because (a) it does not appear by the bill that upon notice and the reasonable request of the plaintiff, the corporation has refused to take action with reference to the matters and things alleged in the bill; (b) it does not sufficiently appear from the allegations of the bill that the corporation is so far under the control of the alleged wrongdoers that any application for relief would be an idle ceremony.

"4. Because it does not appear from the allegations of the bill that the plaintiff has been diligent in protecting her alleged rights at the meeting at which the individual defendants voted

themselves salaries, as alleged in the eleventh paragraph of the bill.

"5. The allegations in the bill do not sufficiently comply with the requirements of R. L. c. 159, § 12, in that the bill contains allegations with reference to many immaterial and irrelevant matters which specifically are as follows:

"(a) In the first paragraph of the bill the statements with reference to the partnership of Almy, Bigelow and Washburn, the interests of the partners therein, and the amounts to the credit of the various partners in 1899; the statements with reference to the original issue of the common shares of the defendant corporation; the allegations with reference to the issues of preferred stock without voting power;

"(b) In paragraph two of the bill the allegations with reference to the plaintiff's interest in the corporation known as Almy's Ltd. and W. T. Grant Company, and the success of both corporations;

"(c) In paragraph four of the bill the allegations with reference to the defendant Sanborn's ownership of preferred stock;

"(d) In paragraph five of the bill the allegation with reference to certain dividends on seventy-five shares of common stock of the defendant corporation payable to the trustees under the will of James F. Almy;

"(e) In paragraph nine of the bill the allegation to the effect that the defendant corporation does a large business with the Merchants National Bank of Salem;

"(f) In paragraph ten of the bill the allegation to the effect that in the past the profits of the defendant corporation have been paid partly in dividends and partly in the form and under the guise of salaries to the large stockholders who own and control substantially the entire issue of common stock of the corporation;

"(g) In paragraph eleven of the bill the allegations with reference to the interest of the plaintiff and certain defendants in the W. H. Scroggie Co., the reorganization thereof, the allegations in connection therewith relating to the compensation of the defendants Warren H. Butler, Sanborn and Annable, and the allegation with reference to the discharge of a debt from the defendant Sanborn to the defendant corporation.

"6. Because the allegations with reference to conspiracy and fraud contained in the eleventh and twelfth paragraphs of the bill

are not sufficiently clear and definite in that they do not disclose (a) in what respect the plaintiff's rights as a stockholder have been invaded; (b) that at the meeting at which salaries were voted, as alleged in said paragraphs, the plaintiff took, or declined to take, any action to protect her rights; (c) that in voting said salaries, as alleged in said paragraphs, there was any agreement or concert of action among the individual defendants, but on the contrary the said allegations show that the only defendants conspiring together were the defendants Annable and Sanborn, who upon the allegations of the bill, own and control only one hundred of the common shares out of a total of two thousand common shares; (d) in what respect the defendants Annable and Sanborn have exercised undue influence over the older and feebler stockholders, as alleged in paragraph twelfth of the bill; (e) clearly and in detail what misrepresentations were made to the defendant Bigelow as to the plaintiff; (f) how and what large sums of money the individual defendants have taken from the defendant corporation without color of right, because the votes referred to in the eleventh paragraph of the bill establish at least a color of right for the only sums otherwise alleged in the bill to have been taken; (g) the date or dates upon which said conspiracy took place."

The demurrer was heard by *Carroll, J.*, who overruled it and, being of opinion that the questions of law raised by the demurrer so affected the merits of the controversy that they ought, before further proceedings, to be determined by the full court, reported the case upon the demurrer for determination by the full court.

Material portions of R. L. c. 159, § 12, are as follows: "The material facts and circumstances which are relied on by the plaintiff shall be stated with brevity, and immaterial and irrelevant matters shall be omitted."

W. A. Pew, (*S. H. Batchelder* with him,) for the defendants.

E. A. Whitman, for the plaintiff.

PIERCE, J. This is a suit in equity by the plaintiff and an intervenor, minority stockholders in Almy, Bigelow and Washburn, Inc., against that corporation and seven of the eight individuals who with the plaintiff Almy constituted the board of directors of the defendant corporation when the bill was brought as well as when the acts and votes of every member of that board, except the plaintiff Almy, caused the wrongs to the defendant

corporation charged in the bill. In the Supreme Judicial Court the defendants demurred to the bill; that demurrer was overruled, and without further proceedings the cause was reported to the full court.

For the purposes of this decision the demurrer admitted that the plaintiff, Emma S. Almy, is and was one of the eight directors who compose the board of directors of the defendant corporation; that the capital stock of the corporation is divided into two thousand shares of common stock, which shares are entitled to exclusive voting power, and fifteen hundred shares of preferred stock without voting power; that the plaintiff Almy and the intervenor are the holders of five hundred and thirty-six shares of the common stock, and the defendants are the holders of thirteen hundred and sixty-seven shares of common stock; that the defendants Warren H. Butler, Annable and Sanborn, conspired with the other individual defendants to deprive and defraud the plaintiff Almy of her rights as a stockholder; that in pursuance of that purpose, on June 23, 1919, a meeting of the board of directors was held at which the plaintiff and the individual defendants were all present, constituting the whole board of directors, whereat and against the protest of the plaintiff Almy, a salary was voted to each and every member of the board, except the plaintiff, Almy; that one of the board, Helen J. Butler, renders no service therefor; that three of the board are voted and given salaries largely in excess of a fair salary to them and to each of them; that the salaries of all of them and of each of them are largely in excess of salaries which they had received for like service previous to the vote of the board; and that the board of directors voted to discharge a debt of one of the members to the defendant corporation of \$2,500, being the amount illegally drawn by him from the treasury of the corporation.

The first ground of the demurrer relied on by the defendants is that the bill is multifarious. The object of the bill primarily is to restrain the corporation from paying, and the individual defendants from receiving, under the vote of June 23, 1919, either excessive salaries or gifts and gratuities; and secondly, to require of the individual defendants the repayment to the corporation of all gifts, gratuities, and excessive salaries received by them or any of them under the aforesaid vote. Presumably an accounting if had would show different sums to be repaid by the individual defendants, but the several obligations to repay arise from the

illegal united and joint action of the individual defendants against the right of the defendant corporation and that of the plaintiff. No relief is sought against any member of the board for the violation of any duty or obligation other than such as such members may owe to the corporation itself; and none is prayed for. "It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it is sufficient if each party has an interest in some matters in the suit, and that they are connected with the others." *Lenz v. Prescott*, 144 Mass. 505, 513. *Robinson v. Guild*, 12 Met. 323, 328. *Bliss v. Parks*, 175 Mass. 539, 543. *Ginn v. Almy*, 212 Mass. 486, 493, 494.

The defendants next contend that "it does not appear from the allegations of the bill that upon notice and the reasonable request of the plaintiff the corporation has refused to take action with reference to the matters complained of in the bill, nor does it sufficiently appear from the allegations of the bill that the corporation is so far under the control of the alleged conspirators that any application for relief would be an idle ceremony." The individual defendants, who constitute seven of the eight members of the board and who hold a large majority of the voting stock of the corporation, admit by their demurrer the charges of wilful fraud and collusion, admit that they are all and each of them receiving salaries which are excessive, admit that some of them are receiving gifts or gratuities, and admit that they all voted that the corporation should pay such salaries and make such gifts, against the open protest of the eighth member of that board. In these circumstances it is plain an application to the wrongdoers to set in motion an action against themselves in the name of the corporation would be futile and unavailing; and it would be wholly contrary to established principles of justice to permit the authors of a wrong to conduct the litigation against themselves as agents of the injured corporation. *Peabody v. Flint*, 6 Allen, 52. *Brewer v. Boston Theatre*, 104 Mass. 378, 387.

The defendants next contend that the bill does not show that the plaintiff has been diligent. We are of opinion that the facts do show diligence: the plaintiff protested at the meeting, the votes were passed against her protest, and this suit was brought within six months after that meeting.

We find nothing in the allegations of the bill by way of in-

ducement which exceed the limits of fair statement contemplated by R. L. c. 159, § 12.

We are of opinion the demurrer must be overruled and the cause remanded to the county court for further proceedings.

Ordered accordingly.

DAVID S. GREENOUGH & another, trustees, vs. WILLIAM P. OSGOOD
& another, executors, & others.

Suffolk. January 21, 1920. — February 28, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Trust, Declaration in contemplation of marriage, Construction of instrument creating trust, Validity. Jurisdiction. Perpetuities, Rule against. Conflict of Laws. Equity Jurisdiction, Bill for instructions. Power.

A single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, executed in Massachusetts a declaration placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents. One of the provisions of the declaration was that, in certain contingencies, the property should go to such "person or persons as would, by the laws of the Commonwealth of Massachusetts, have been or be entitled to the same." After the marriage, the donor and her husband lived for many years in California, then for many years in Massachusetts, and then in New York, where she died and her will was proved. Upon a bill in equity by the trustees for instructions, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit.

A power of appointment of property, real or personal, in favor of a child is well exercised by an appointment to a trustee in favor of the child.

A declaration of trust, made by a woman in contemplation of her marriage, provided that, if she survived her husband, the trustee should hold the property upon her death for the use of her children "for such estates and interests, and in such shares and proportions, and to be vested in him her or them, at such respective ages or times, and in such manner" as she by deed, instrument in writing or will "should direct or appoint. And in default of such direction or appointment, or in case any such shall be made, then when and as the estates thereby limited shall respectively end and determine, to the use of" her children, "their heirs and assigns forever." The donor survived her husband and died, testate, leaving four children, one of whom had a minor son living. Her will directed that the property in trust should be conveyed to the executor of her will in trust, by him to be divided into as many shares as she had children who

should be living at her death or who should have died leaving issue then living, and that one share should be given to each such child, or living issue of child deceased, except as to the share of a fourth child, which she directed the executor, as trustee, to hold in trust and to pay the income thereof to that son during his life and, after his death, to convey the principal in equal shares to his then living children, "their heirs, executors and administrators forever; or if there then be no such children, then" to convey such share in equal portions to the other children of the testator then living or the surviving issue of such as should have died. Upon a bill in equity by the trustee under the declaration of trust for instructions, it was *held*, that

(1) The power of appointment, reserved by the donor to herself in the declaration of trust, was well exercised by her will;

(2) The appointment to the first three children of the donor and to the children, living at the death of the donor, of any one of them who had died before the donor, since it provided for a vesting of their interests within twenty-one years after a life in being at the time of the creation of the power, was not a violation of the rule against perpetuities, and was valid;

(3) The limitation in remainder to such children of the fourth child of the donor as should be living at the death of such fourth child, since it provided for a vesting of such interests which might occur more than twenty-one years after a life in being at the time of the creation of the power, was a violation of the rule against perpetuities and was void;

(4) There being a default of appointment of the interest in remainder following the life estate of the fourth child of the donor, that interest, by the provisions of the declaration of trust, vested in the children of the donor and their heirs and assigns;

(5) The entire trust fund should be conveyed to the executor of the will of the donor for the use and benefit of the children of the donor "as their interests in the fund appear."

BILL IN EQUITY, filed in the Supreme Judicial Court for the county of Suffolk on August 25, 1919, by the trustees under an antenuptial declaration of trust made by Hannah Parkman Newell, in contemplation of her marriage to Edward S. Osgood.

The material allegations of fact, which were admitted to be true by the defendants in their answers, and such of the facts included in agreed statements of fact as are material, are stated in the opinion.

The suit came on to be heard before *Carroll, J.*, who reserved it for determination by the full court.

J. A. Locke, for the plaintiffs, stated the case.

F. G. Goodale, for the defendant William P. Osgood and others.

J. A. Brickett, for the defendant Robert T. Osgood.

J. Codman, for the executors of the will of Hannah P. Osgood.

H. S. Davis, for himself as guardian *ad litem* for persons unascertained or not in being and for Parkman Osgood.

PIERCE, J. This cause was reserved for the full court by a single justice of the Supreme Judicial Court upon the pleadings and agreed statements of fact, and is a bill in equity for instructions by the trustees under an antenuptial declaration of trust, made in Massachusetts on May 7, 1860, by Hannah Parkman Newell, in contemplation of a marriage which was intended to be, and in fact shortly was, solemnized between the said Hannah P. Newell and one Edward S. Osgood.

All the property put in trust belonged to Hannah Parkman Newell and was inherited from her mother, who resided in Boston, Massachusetts, and was there domiciled at the time of her death. It consisted of real estate located entirely in Massachusetts, of mortgages on real estate located entirely in Massachusetts, and of various securities, which, together with all other documents of title, were thereafter kept in Boston, Massachusetts. At the time of the death of Hannah P. Osgood on October 9, 1918, all the property held by the trustees under the antenuptial trust and agreement of May 7, 1860, consisted solely of stock and bonds, loans and cash, including one mortgage on real estate in Connecticut; and the securities and documents of title were and have since been in a safe deposit vault in said Boston. The trustees nominated in the trust instrument accepted the trust, were residents of Massachusetts and continued such until resignation, and at least one of the succeeding trustees under the agreement and trust of May 7, 1860, has always been a resident of the Commonwealth of Massachusetts.

When the antenuptial agreement and trust were executed in Massachusetts Hannah P. Newell resided with her father in the city, county and State of New York and Edward S. Osgood was domiciled in San Francisco, California. Immediately upon the marriage, Hannah P. Osgood and her husband removed to California, where they resided for many years. Subsequently she removed with her husband to Boston, where they resided for many years. Finally she removed to New York, where she died on October 9, 1918, leaving a will which was duly proved and allowed by the Surrogates Court in and for the county and State of New York.

Although the donor in her declaration of trust was not domiciled in Massachusetts, we think it plain that she intended that

the trust should be administered under the laws of that State, by the appointment of the trustees who were residents of Massachusetts, by the fact that the trust property consisted very largely of real estate and real estate mortgages, located entirely in Massachusetts, by the provision of the trust instrument that the property in certain contingencies should go to the "person or persons as would, by the laws of the Commonwealth of Massachusetts, have been or be entitled to the same," and by the further fact that the Massachusetts trustees or trustee could at no time have been compelled to account for the property in trust, in any State other than Massachusetts. *Sewall v. Wilmer*, 132 Mass. 131. *Codman v. Krell*, 152 Mass. 214, 218. *Russell v. Joys*, 227 Mass. 263. It follows that the Massachusetts courts have jurisdiction over the matter in issue.

By the antenuptial agreement and trust Hannah Parkman Newell gave or reserved to herself a special power of appointment over the property conveyed to the trustees, in the event she married and survived Edward S. Osgood, in the following language: "And in case the said Edward S. does not survive the said Hannah P. then at and from the decease of the said Hannah P. to the use of all and every the child and children of the said Hannah P. for such estates and interests, and in such shares and proportions, and to be vested in him her or them, at such respective ages or times, and in such manner, as the said Hannah P. alone, and notwithstanding her coverture, by any deed or instrument in writing, containing a power of revocation, to be sealed and delivered by her in the presence of and attested by three or more credible witnesses, or by her last will and testament in writing, or by any writing in the nature of a last will, to be signed and published by her in the presence of three or more credible witnesses, shall direct or appoint. And in default of such direction or appointment, or in case any such shall be made, then when and as the estates thereby limited shall respectively end and determine, to the use of the children of the said Hannah P., their heirs and assigns forever."

Hannah P. Osgood survived her husband, and left four children, William P. Osgood, Edward W. Osgood, Robert T. Osgood, and Anna P. Osgood Culver. All of said persons are of full age and are all made parties defendant to this bill. The only living issue of said children is Parkman Osgood, a minor son of William P.

Osgood, who is made a party defendant by the bill and appears by Harold S. Davis, guardian *ad litem*. At the time of the decease of Hannah Parkman Osgood the plaintiffs as succeeding trustees, held personal property only, which they are desirous of paying over and making distribution of among the persons entitled thereto.

The will of Hannah Parkman Osgood, which was proved, allowed and admitted to probate by the Surrogates Court in and for the county and State of New York on December 24, 1918, and of which William P. Osgood and Frederic F. Culver, defendants in this bill, were duly appointed executors, contained two paragraphs in execution of the power of appointment vested in the testatrix by the marriage settlement. These items are as follows:

"First. Under and pursuant to any and all powers of appointment by Will or otherwise which are now or may hereafter be vested in me by virtue of the marriage settlement made between me and my late husband Edward S. Osgood, or otherwise, as well as with the intent also to dispose of all property of whatsoever kind or nature, and wheresoever situate, of which I may die seized or possessed, or which I may in any way be entitled to dispose of at my death, I hereby direct, appoint, give, bequeath and devise as follows. . . .

"Twelfth. After the payment of all appointments, legacies and charges hereinbefore provided for in this my Will, I give, devise, bequeath and appoint all the rest and residue of the property of whatsoever kind and nature, and wheresoever situate which I may be entitled to dispose of by Will, including any and every lapsed legacy or appointment provided for in this my Will, to my Executors hereinafter named, in Trust nevertheless, to divide the same into so many shares or portions as shall equal the number of my children who shall be living at the date of my death, or who shall have died leaving issue who shall be living at the date of my death, such issue to be counted *per stirpes* and not *per capita* in making such division, and after such division.

"(a) To pay over, deliver, transfer and convey one of said shares or portions to my said daughter Anna P., her heirs, executors and administrators, forever, if she be living at the date of my death, or if not then living, in equal share to such of her children as shall then be living;

“(b) To pay over, deliver, transfer and convey another of said shares or portions to my said son William P., his heirs, executors and administrators, forever, if he be living at the date of my death, or if not then living, in equal shares to such of his children as shall then be living;

“(c) To pay over, deliver, transfer and convey another of said shares or portions to my said son Edward W., his heirs, executors and administrators, forever, if he be living at the date of my death, or if not then living, in equal shares to such of his children as shall then be living;

“(d) To hold, invest, reinvest and keep invested the remaining share or portion, and to pay the rents, issues and profits therefrom arising to my said son Robert T. Osgood during his life, and upon his death to pay over, deliver, transfer and convey the principal of said trust fund in equal shares to the then living children of my said son Robert T. Osgood, their heirs, executors and administrators forever; or if there then be no such children, then to pay over, deliver, transfer and convey said principal, in equal shares, to such of my said children Anna P., William P. and Edward W., as shall then be living, or to the issue of such of them as shall not then be living, such issue to take the share their deceased parent would have received hereunder, *per stirpes* and not *per capita*.”

Upon the decease of Hannah Parkman Osgood, and following the probate of her will, the executors named therein and appointed by the Surrogates Court requested the plaintiffs and trustees under the antenuptial agreement and trust to deliver to them the property then and now held by the plaintiffs under the instrument of trust, to be held by the executors in trust to the use and benefit of the persons named in said will. The plaintiffs “are in doubt as to their duty as to the distribution of said trust fund and the accumulations thereon” and pray “that this Honorable Court will instruct them” as follows:

“First. Was the power reserved to said Hannah Parkman Osgood, then Hannah Parkman Newell, in said antenuptial or trust agreement of May 7, 1860, duly exercised, in whole or in part?

“Second. To whom should your petitioners pay over the said fund and accumulations thereon?”

The fundamental question is whether the special power of ap-

pointment to the use of all and every child and children of the said Hannah P. Osgood "for such estates and interests, and in such shares and proportions, and to be vested in him her or them, at such respective ages or times, and in such manner, as the said Hannah P. . . . shall direct or appoint," which the donor reserved to herself as donee, is limited by the provision of the trust instrument to a power to determine the proportions which each of the children should take as an absolute estate as his or her share of the whole estate; or whether the power was well executed by the bequest of all the rest and residue of the property of donee to her executor in trust "to divide the same into so many shares . . . as shall equal the number of my children . . . and after such division . . . pay" one share to "Anna P.," one share to "William P.," and to hold another share in trust for the benefit of "Robert T. Osgood during his life, and upon his death to pay over . . . to the then living children of . . . said . . . Robert T. Osgood. . . ."

We are of opinion that the power was well exercised and justified by the provision of the antenuptial agreement and trust, which deals with the contingency of a failure to make an appointment on the determination of estates appointed, in the following terms: "And in default of such direction or appointment, or in case any such shall be made, then when and as the estates thereby limited shall respectively end and determine, to the use of the children of the said Hannah P., their heirs and assigns forever." It is plain the donor, who was the donee, could not have intended to create absolute interests in all her children, the proportion or share in the whole estate alone to be determined by her, because an absolute estate or an interest in fee is incompatible with a limited estate which shall end and determine.

The provisions above quoted distinguish the case at bar from *Hooper v. Hooper*, 203 Mass. 50, wherein the donee of a special power of appointment was held to have a mere power of selection among her children and to determine the proportion each one should take in the principal of a trust fund held by trustees for the life use of the donee. For similar reasons the case is distinguished from *Myers v. Safe Deposit & Trust Co. of Baltimore*, 73 Md. 413, and *Pepper's Appeal*, 120 Penn. St. 235. See *Graham v. Whitridge*, 99 Md. 248, 278, explaining *Myers v. Safe Deposit & Trust Co. of Baltimore*.

It is settled that a power of appointment of a fund in favor of children is well exercised by an appointment to trustees in favor of children, and "is equally good with regard to real estate as to personal estate." *In re Paget*, [1898] 1 Ch. 290, 295. It follows that the appointment to the executors of the will of Hannah P. Osgood in trust is a valid exercise of the power by the donee. The interest of the children of the testatrix vested within lives in being and twenty-one years from the time of the creation of the power. Consequently the power was valid in its inception. *Dodge v. Bennett*, 215 Mass. 545, 547.

The limitation in remainder to the children of Robert T. Osgood was void for remoteness because it might vest beyond the limits of the rule against perpetuities. *Gray v. Whittemore*, 192 Mass. 367, 372. It is settled that a limitation over which violates the above rule will be considered as stricken out, leaving the prior disposition to operate as if a limitation over had never been made. *Lovering v. Worthington*, 106 Mass. 86, 88. *Goodier v. Johnson* 18 Ch. D. 441. *Courtier v. Oram*, 21 Beav. 91. *Graham v. Whitridge*, *supra*. The remainder after the equitable life estate in Robert T. Osgood, as in default of appointment, under the provisions of the antenuptial agreement and trust, vested in the children of Hannah P. Osgood and their heirs and assigns.

It follows that the trustees are instructed that the gift to the executors was a proper exercise of the power and that the entire fund should be paid over to the executors to be administered as trustees for the use and benefit of the children as their interests in the fund appear. *Olney v. Balch*, 154 Mass. 318. *Stone v. Forbes*, 189 Mass. 163. *Tudor v. Vail*, 195 Mass. 18. *Howland v. Parker*, 200 Mass. 204. *Gardiner v. Treasurer & Receiver General*, 225 Mass. 355, 362.

Decree accordingly.

CATHERINE HART vs. RUTH P. WRIGHT.

Suffolk. March 1, 1920. — March 3, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Of owner of real estate. Snow and Ice. Way, Public. Municipal Corporations, By-laws and ordinances.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material.

TORT for personal injuries sustained on January 23, 1917, alleged to have been caused by slipping upon an accumulation of ice on the sidewalk in front of and adjoining vacant land owned by the defendant on A Street in South Boston. Writ dated May 25, 1917.

In the Superior Court the case was tried before *Fessenden, J.* The plaintiff introduced evidence that at about 8:30 P.M. on January 23, 1917, while walking on the sidewalk in front of the defendant's land she slipped on the ice and fell, breaking her arm, and that the entire surface of the sidewalk at the time was a glare of ice about three inches thick, without sand, ashes or other material to prevent slipping. The defendant admitted that, since February 27, 1916, when she became owner of the land, she had never removed nor caused to be removed any snow or ice from the sidewalk, nor placed nor spread any ashes, sand, sawdust or other material to cover any ice or snow on the sidewalk.

There was evidence that there was no structure other than a billboard on the defendant's land. At the close of the plaintiff's evidence the defendant asked the judge to rule that on all the evidence the plaintiff was not entitled to recover. The judge so ruled and ordered a verdict for the defendant. The plaintiff alleged exceptions.

A. J. Connell, for the plaintiff, submitted a brief.

H. P. L. Partridge, for the defendant.

BY THE COURT. This is an action of tort wherein the plaintiff seeks to recover compensation for personal injuries sustained by her while a traveller upon a highway, by slipping upon natural ice on the sidewalk adjacent to land owned by the defendant. There was no evidence of artificial collection of water by spout or otherwise. The record utterly fails to disclose any ground of liability. This is equally so, even if it be assumed that the defendant violated some ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. The case is covered by the authority of numerous decisions. *Kirby v. Boylston Market Association*, 14 Gray, 249, 252. *Sanborn v. McKeagney*, 229 Mass. 300, and cases collected.

Exceptions overruled.

NATHAN BARNETT vs. SARAH ROSEN & another.

Suffolk. — November 19, 1919. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Evidence, Relevancy and materiality. Contract, Consideration. Accord and Satisfaction.

Where, in the answer in a suit based upon a judgment debt alleged to be owed to the plaintiff by a woman, the defendant alleged satisfaction of the debt by an accord and satisfaction, the defendant properly may be allowed to introduce evidence of negotiations leading up to a payment of less than the amount of the judgment debt under an agreement by the plaintiff that such amount would be accepted in satisfaction of that debt and also of a judgment debt owed to the plaintiff by the defendant's husband, which she was under no obligation to pay, and that the plaintiff further in writing agreed to indorse full satisfaction upon executions which had issued upon the judgments.

An oral agreement by a judgment creditor with the judgment debtor to receive a certain sum, less in amount than the judgment debt, in full satisfaction of that judgment debt and also of a judgment debt owed to the creditor by another person, to which the first judgment debtor is a stranger, and to indorse satisfaction in full upon executions which had issued upon both judgments, when the first judgment debtor has made the payment stipulated and the creditor has made the indorsement of full satisfaction upon both executions, is not *nudum pactum*, and a suit in equity by the judgment creditor to enforce the first judgment must be dismissed.

BILL IN EQUITY, filed in the Superior Court on March 20, 1919, to reach and apply, in satisfaction of a balance of \$102.75 of a

judgment debt alleged to be owed to the plaintiff by the defendant Sarah Rosen (hereinafter called the defendant), an unliquidated claim against the defendant Providence Washington Insurance Company.

Upon stipulation of all the parties and with the consent and approval of the court, the bill was dismissed as against the insurance company after that defendant had paid into court \$150 to abide the final decree in this suit.

The suit was heard by *Jenney, J.* Material facts found by him without a report of the evidence and exceptions saved by the plaintiff to the admission of evidence are described in the opinion. The plaintiff asked for the following rulings:

"1. That upon all the evidence in the case the finding must be for the plaintiff.

"2. That upon the pleadings in the case the plaintiff is entitled to a finding in his favor.

"3. That the defendant cannot set up as a defence an alleged agreement contained in a receipt signed by the plaintiff, that he will accept \$35 as payment in full and in satisfaction of a judgment of \$116.24 due from the defendant as judgment debtor.

"4. That an agreement to accept a lesser amount as payment in full and in satisfaction of a greater amount, which amount is not in dispute, is void for want of consideration.

"5. That an agreement between the plaintiff and the defendant which is wanting in consideration is not enforceable in equity because of want of consideration.

"6. That in a suit to recover the balance of a judgment debt a promise made by the plaintiff to the defendant that upon payment to him by the defendant of a smaller amount than the judgment debt [the judgment debt should be discharged] is not available as a defence in said action.

"7. That if in the body of a receipt for money given by the plaintiff to the defendant it contained a statement that the plaintiff will indorse a statement of satisfaction in full upon an execution he held against the defendant upon the payment by the defendant to the plaintiff of a lesser sum than the sum due from the defendant as stated in said execution, such promise is without consideration, and is an agreement *nudum pactum*, is void and unenforceable.

"8. That the defendant cannot enforce specific performance of an alleged agreement made without consideration."

The requests were denied. The judge ordered a decree dismissing the bill; and the plaintiff alleged exceptions.

N. Barnett, pro se.

H. C. Dunbar, for the defendant Rosen.

BRALEY, J. The plaintiff, a judgment creditor, brings suit under R. L. c. 159, § 3, cl. 7, to reach and apply in satisfaction of a judgment recovered against the defendant Rosen the amount coming to her under a policy of fire insurance issued by the co-defendant, the insurance company. That company having paid into court a certain sum to abide the final decree, the bill by stipulation of parties has been dismissed against the company; and, the trial court having ordered a decree dismissing the bill, the case is before us on the plaintiff's exceptions to the admission of evidence, to the refusal to rule as requested, and to the order of dismissal.

We perceive no error in the admission of evidence. The answer avers that by an accord and satisfaction the judgment has been satisfied and the defendant properly was allowed to introduce evidence of the negotiations and of the settlement which included the obtainment of the necessary funds to make payment as well as the form in which payment was made. *Way v. Greer*, 196 Mass. 237.

The remaining question is, whether as matter of law the defendant under the agreement had been discharged from all further liability. The evidence not being reported, the findings of fact of the trial judge are conclusive. It appears that, before judgment against her was obtained, the plaintiff recovered judgment against the defendant's husband on which execution issued and he was cited for examination as a poor debtor. The proceedings however were terminated by the failure of the judgment creditor to appear at the time and place to which the proceedings had been continued for his further examination. The plaintiff previously had cited the defendant for examination as a poor debtor and, after she had defaulted and a *capias* had issued, the plaintiff in person and the defendant by counsel orally agreed that if the defendant would pay "thirty-five dollars" the plaintiff would receive that amount in full satisfaction of both executions. The defendant

borrowed \$20 which was paid to the plaintiff who thereupon signed and delivered the following receipt: "Received of Mrs. Sarah Rosen twenty no/100 Dollars, and upon payment to me within one month of a balance of fifteen dollars, I will endorse a statement of satisfaction in full upon an execution which I have against Sarah Rosen and a similar endorsement upon an execution against Harry Rosen, and I will execute general release of all demands against said Harry and Sarah Rosen." It further appears that the "balance of fifteen dollars" was paid to the plaintiff who thereupon indorsed upon each execution that full satisfaction had been received and delivered them to the defendant.

A further finding, in justice to the plaintiff, should be referred to, namely: that "At the time of making of said oral contract and the execution of said written instrument, the plaintiff told the defendant's attorney that the receipt of said sum, and his agreement referred to in said receipt, was a *nudum pactum* and that he was not bound by his oral agreement or his signed receipt, and that the defendant would still be liable for the balance of her judgment, notwithstanding he had agreed to accept a smaller sum in satisfaction thereof." The judge however was satisfied and expressly finds that the defendant's attorney, acting in her behalf and knowing the plaintiff to be a member of the bar, did not understand nor believe that the plaintiff proposed to collect the balance due upon the execution against her "notwithstanding his agreement and his written promise, and did not expect him so to do."

The requests all rest upon the single proposition that the promise of the plaintiff is unenforceable because it is unsupported by any valuable consideration. We are of opinion that the judge properly refused to give any of the requests and correctly ruled that the bill should be dismissed.

The borrowing by the defendant from her counsel of a part of the amount agreed upon who gave his check therefor to the plaintiff, does not bring the case within the rule, that where the creditor receives in full satisfaction of his debt the promissory note of a third person for a smaller sum than the amount of the debt, it is a good accord and satisfaction. *Brooks v. White*, 2 Met. 283. *Guild v. Butler*, 127 Mass. 386. *Bidder v. Bridges*, 37 Ch. D. 406. The money furthermore was not borrowed

at the plaintiff's request; nor did he know from what source it was to be obtained. *Harriman v. Harriman*, 12 Gray, 341. *Specialty Glass Co. v. Daley*, 172 Mass. 460. Compare *Bunge v. Koop*, 48 N. Y. 225, 229. It also is settled in this Commonwealth that neither the payment of a part of the debt by the debtor when the entire indebtedness is due and payable, nor a partial payment by him of the debt in consideration that such payment shall operate as a discharge of the debt of a third person to the creditor, is sufficient to support a promise not made under seal to release the promisee from all further liability on the remainder of the principal obligation. *Weber v. Couch*, 134 Mass. 26. *Slade v. Mutrie*, 156 Mass. 19, 20, and cases cited. *Specialty Glass Co. v. Daley*, 172 Mass. 460. *Gilman v. Cary*, 198 Mass. 318, 320. *Smith v. Johnson*, 224 Mass. 50. *Lait v. Sears*, 226 Mass. 119, 125. But the judge further found: that "Thereafter, about March 21, 1916, the plaintiff personally, and the attorney representing the defendant, conferred in regard to the adjustment of the claim of the plaintiff against the defendant, and on or about that date it was orally agreed between the plaintiff and said attorney that if the defendant would pay to the plaintiff \$35, the plaintiff would receive the same in full satisfaction of his execution against the defendant and against Harry Rosen; and the defendant then and there, acting through her said attorney, agreed to pay said amount in full satisfaction of both executions." The plaintiff, in return for the payment to him by the defendant of any sum on her husband's debt could make a binding and enforceable agreement, and the agreement found cannot as matter of law be differentiated. It was not to pay the plaintiff a less sum in full satisfaction of her own liquidated and overdue debt of a larger amount, but it was an agreement also to pay this amount in satisfaction of the execution against Harry Rosen, her husband, to whom she was a stranger and on which she was not liable, as well as the execution against herself. The plaintiff, as we have said, having indorsed on both executions satisfaction in full, the indorsement was of itself an application by him not merely in satisfaction of the defendant's debt but of the debt of her husband. It follows that the contract being entire and not severable at the option of the plaintiff, her agreement to pay any sum whatever on the execution against her husband was a sufficient considera-

tion for a valid agreement by the plaintiff to discharge her own debt. *Brooks v. White*, 2 Met. 283, 286. *Bowker v. Childs*, 3 Allen, 434. *Hastings v. Lovejoy*, 140 Mass. 261. *Marshall v. Bul-lard*, 114 Iowa, 462. *Melroy v. Kemmerer*, 218 Penn. St. 381, 384. 1 R. C. L. 182, § 11. 1 C. J. 535, § 37, note 31; 545, § 51, note 27, where many authorities are collected.

It is enough that the consideration is valuable: it need not be adequate. *Train v. Gold*, 5 Pick. 380. *Perkins v. Lockwood*, 100 Mass. 249, 250. *Hastings v. Lovejoy*, 140 Mass. 261, 264.

Exceptions overruled.

ELIZABETH A. FLETCHER vs. L. J. STURTEVANT & another.

Suffolk. January 12, 1920. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Bills and Notes, Indorser. Statute of Limitations.

It seems, that, under the provisions of R. L. c. 202, § 14, the statute of limitations is a bar to an action upon a promissory note payable upon demand, brought more than six years after its date against one of two makers who has not acknowledged the debt nor promised in writing to pay it, although his joint maker has made payments upon the note within six years before the action was begun.

If no demand for the payment of a promissory note, payable upon demand, has been made during more than six years after its date upon one who merely signed his name upon its back before its delivery, and who therefore by R. L. c. 73, § 80, is deemed to be an indorser, an action thereafter begun against him upon the note is barred by the statute of limitations, R. L. c. 202, § 2, cl. 1, § 14, although the maker of the note has made payments upon it within six years of the bringing of the action.

CONTRACT, by the payee named in two promissory notes against L. J. Sturtevant, who signed as maker, and R. M. Sturtevant, who signed the instruments on the back before they were delivered, for a balance due upon the notes. Writ in the Municipal Court of the City of Boston dated January 15, 1918.

The defendant L. J. Sturtevant was defaulted. The action was tried in the Municipal Court against R. M. Sturtevant (hereinafter called the defendant). At the close of the evidence, the plaintiff asked for the following rulings:

"1. That, if the notes set forth in the plaintiff's declaration were signed by both of the defendants before delivery to the plaintiff, and on the statement of the plaintiff that she would not advance the money merely on the note of the defendant L. J. Sturtevant, but must have notes from both of the defendants, then the defendants are co-makers of the notes, and the plaintiff is entitled to consider the defendant R. M. Sturtevant as the co-promissor with the defendant L. J. Sturtevant.

"2. That, if the defendant R. M. Sturtevant is a co-maker with the defendant L. J. Sturtevant, then neither of the defendants is entitled to a demand and notice of non-payment.

"3. That, the notes set forth in the plaintiff's declaration being payable on demand, the bringing of this action is a sufficient demand.

"4. That, if payments were made by the defendant L. J. Sturtevant on said notes within six years from the date of the bringing of this action, then this action is not barred by the statute of limitations against either of said defendants.

"5. That, if payment were made on said notes by the defendant L. J. Sturtevant within six years from the date of the bringing of this action to the knowledge of the defendant R. M. Sturtevant, then this action is not barred by the statute against the said R. M. Sturtevant.

"6. If within six years from the date of the bringing of this action the defendant R. M. Sturtevant acknowledged that said notes were still outstanding and enforceable, and promised that the same would be paid, then the action is not barred by the statute of limitations against the said R. M. Sturtevant.

"7. That if the plaintiff would not have loaned the money and taken the notes without the signature of the defendant R. M. Sturtevant, then the same are supported by sufficient consideration as against said R. M. Sturtevant."

The judge denied these requests and found as a fact that the defendant signed the notes in question on the back thereof, although before delivery; that he never paid any part of either the principal or the interest due on the notes; that no demand for the payment thereof ever was made on him, and that the notes were dated February 29, and October 2, 1899, and were not witnessed. He ruled that the defendant was not a co-maker but an

indorser, and that, as to him, the action was barred by the statute of limitations.

At the request of the plaintiff, the judge reported the case to the Appellate Division, who dismissed the report. The plaintiff appealed.

Material statutory provisions are the following:

R. L. c. 73, § 34, cl. 6. "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign he is to be deemed an indorser."

R. L. c. 73, § 80. "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

R. L. c. 73, § 106. "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

R. L. c. 202, § 12. "No acknowledgment or promise shall be evidence of a new or continuing contract whereby to take an action of contract out of the operation of the provisions of this chapter or to deprive a party of the benefit thereof, unless such acknowledgment or promise has been made by, or is contained in, a writing signed by the party who is chargeable thereby."

R. L. c. 202, § 14. "A joint contractor or his executor or administrator shall not lose the benefit of the provisions of this chapter so as to be chargeable by reason only of an acknowledgment or promise made or signed, or by reason of a payment made by, any other joint contractor or his executor or administrator."

H. G. Fletcher, for the plaintiff.

W. F. Prime, for the defendant *R. M. Sturtevant*.

BRALEY, J. The two promissory notes in suit, payable on demand, are signed on the face by the defendant *L. J. Sturtevant*, and on the back by *R. M. Sturtevant*, who alone defends and to whom reference will be made as the defendant.

It was decided in *Union Bank of Weymouth v. Willis*, 8 Met. 504, that where, as in the case at bar, the defendant before delivery signs on the back of the note, he is a joint and several maker or promisor, and in *Allen v. Brown*, 124 Mass. 77, that

parol evidence is inadmissible to show that this was not the real contract. But St. 1874, c. 404, Pub. Sts. c. 77, § 15, required notice of non-payment to all persons becoming parties to promissory notes payable on time by a signature in blank on the back thereof, the same as if they were indorsers. A promissory note payable on demand however is not within the statute, *Hitchings v. Edmands*, 132 Mass. 338, and the defendant would not have the rights of an indorser, nor could he be considered as such, if it were not for St. 1898, c. 533, § 63, now R. L. c. 73, § 80, in force when the notes were given, which provides that "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." *Brooks v. Stackpole*, 168 Mass. 537. *Toole v. Crafts*, 193 Mass. 110, 111.

But, even if he is treated as maker, the notes were payable at once, and, more than six years having elapsed before the action was begun, the statute of limitations, R. L. c. 202, § 14, would be a bar, as the partial payments made by L. J. Sturtevant which interrupted the running of the statute as to him, were not binding on the defendant. *Fenno v. Gay*, 146 Mass. 118. *Peirce v. Tobey*, 5 Met. 168. *Balcom v. Richards*, 6 Cush. 360. *Faulkner v. Bailey*, 123 Mass. 588. If he is deemed an indorser, it is conceded that no notice of non-payment was ever given or demand for payment made before bringing suit.

The trial judge therefore rightly refused to give the plaintiff's requests, and, no error appearing in his rulings, that the defendant is not a co-maker but an indorser, and that as to him the action is barred by the statute of limitations, the order dismissing the report should be affirmed.

So ordered.

MAY B. MANSELL vs. ANNA C. HANDS, executrix.

SAME vs. ANNA C. HANDS.

Middlesex. January 12, 1920. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Landlord and Tenant, Landlord's liability to tenant for defect.

At the time of the letting of an unfurnished house to a tenant at will there was in it a hot air furnace with a hot water coil attachment which had been installed for over twenty-one years and which was defective owing to a lack of an appliance to provide for the relieving of excessive pressure in the coil. The tenant examined the apparatus when he agreed to take the premises and it appeared to be in good working order. Six months later, there was an explosion resulting in an injury to the tenant, who brought an action of tort to recover therefor against the landlord, at the trial of which there was no evidence that the landlord knew of the defective condition or had knowledge of facts from which such a condition might have been inferred. A verdict was ordered for the defendant. *Held*, that

(1) The rule of *caveat emptor* applied and there was no implied warranty by the defendant that the premises were fit for use;

(2) Even if it be assumed that the defect was hidden and not ascertainable by the plaintiff upon examination preceding the tenancy, the verdict was rightly ordered, since there was no evidence of knowledge by the defendant of the concealed defect or of facts which would put him upon notice.

TWO ACTIONS OF TORT, the first against a husband and the second against his wife, it being alleged in the declaration in each action that the defendant was the owner of a house numbered 1879 on Massachusetts Avenue in Cambridge in which the plaintiff was a tenant, that, owing to a neglect of the defendant to provide valves and other appliances for the relieving of excessive pressure in a hot water coil in a hot air furnace, the coil burst and that the plaintiff was injured. Writs dated, respectively, March 20 and September 22, 1916.

Before a trial of the actions, the defendant in the first action died and his wife, executrix of his will, was allowed to come in and to defend the action.

The actions were tried together in the Superior Court before

White, J. Material evidence is described in the opinion. At the close of the plaintiff's evidence, on motion by the defendant, verdicts were ordered for the defendant; and the plaintiff alleged exceptions.

P. A. Hendrick, for the plaintiff.

A. A. Schaefer, for the defendant.

BRALEY, J. While it is clear that the testator never had been the lessor, but acted only in making repairs and in collection of rent as agent of his wife, who owned and let the premises, and the plaintiff fails to show any cause of action in the first action, no question as to the absence of common liability is raised, and we shall accordingly refer to Anna C. Hands as the defendant. The plaintiff is a tenant at will, and the jury would have been warranted in finding that, at the date of rental, the heating apparatus consisted of a hot air furnace, inside of which was a hot water coil connecting with two radiators, one in the kitchen and one in the chamber above the dining room in the back part of the house, and that, six months after her occupancy began and nearly twenty-two years after the system was installed, the radiator in the chamber exploded causing personal injuries for which she seeks damages. It also could have been found on the evidence of the plaintiff's expert, that the system was defective because no expansion tank had been provided, nor any "release" nor "expansion" valve, which would have been the equivalent of a tank. But, notwithstanding these omissions, it was his opinion, which the jury could have followed, that the supply pipe connecting the coil with the street water main would have been sufficient to take care of the expansion if a check valve had not been improperly placed in the pipe, the closing of which created an excessive pressure causing the explosion. The exact location of the check valve however does not appear, nor is there any direct evidence whether it was necessary in operating the coil to open the valve for the admission of the required supply of water.

It is shown that, when the premises were let, the apparatus, which was looked over by the plaintiff appeared to be in good working order, and that, until the explosion, she took care of the furnace. But the question of her due care or assumption of risk is immaterial on the present record. "The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary

to determine whether the premises he hires are safe, and adapted to the purposes for which they are hired," and there is no implied warranty in the letting of an unfurnished house that it is reasonably safe for use. *Cowen v. Sunderland*, 145 Mass. 363. The plaintiff's only remedy is in tort, for reasons fully stated in *Stevens v. Pierce*, 151 Mass. 207, 209, where preceding cases are cited, and *Martin v. Richards*, 155 Mass. 281, where they are exhaustively reviewed. "If there is a concealed defect that renders the premises dangerous which the tenant cannot discover by the exercise of reasonable diligence, of which the landlord has or ought to have knowledge, it is the landlord's duty to disclose it, and he is liable for an injury which results from his concealment of it." *Booth v. Merriam*, 155 Mass. 521, 522. *Cutter v. Hamlen*, 147 Mass. 471, 475.

But, even if it is assumed that the jury would have been warranted in finding that when the plaintiff examined the premises the check valve was not plainly visible and could have been located only after investigation by a competent mechanician, she failed to offer any evidence which would justify a finding that the defendant knew, or had knowledge of any circumstances from which such a result could be inferred, that the hot water system had been so defectively installed that its use might cause an explosion of the radiators. If the defendant did not know of any concealed defect or conditions which might make the use of the premises dangerous, no liability has been shown, and the verdicts were ordered rightly. *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 558.

The exceptions therefore in each case must be overruled.

So ordered.

FRANK NAVICKIS, administrator, vs. FIREMAN'S FUND INSURANCE
COMPANY.

Plymouth. January 13, 1920. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Insurance, Of motor vehicle, Theft, Notice of loss. Waiver.

In an action against an insurance company by one of two persons upon a policy of insurance insuring them "as their interest may appear" against loss of an automobile by theft, and containing a condition that failure to give notice of loss within a certain time shall render a claim of loss void, if neither person gives the required notice after the theft of the automobile, neither person has any enforceable right under the policy and a payment by the company to one of the insured persons of the amount of his loss is a mere gratuity and does not operate as a relinquishment by the company of the right to insist that a failure by the other person to give the required notice was a bar to an action by him upon the policy.

CONTRACT by the administrator of John Nevat upon a policy insuring "The Henley-Kimball Company and John Nevat, as their interest may appear" against certain perils to an automobile, including theft, it being alleged that the automobile was purchased by Nevat from the Henley-Kimball Company by a contract of conditional sale, and that it had been stolen. Writ dated February 27, 1919.

In the Superior Court the case was tried before *Keating, J.* The material evidence is described in the opinion. The judge ordered a verdict for the defendant and reported the case to this court for determination with the stipulation of the parties that "If the action of the defendant in accepting from the Henley-Kimball Company on December 14, 1918, the proof of loss executed by that company and paying to that company the amount of its interest in said automobile, constituted a waiver on the part of the defendant of compliance on the part of the other assured of the provisions of the policy relative to notice and proof of loss of which this plaintiff can avail himself and a waiver—not only as between the Henley-Kimball Company and the defendant but also as between John Nevat's estate and the defendant—of the forfeiture which had resulted from the neglect of either assured

to render notice in writing and a proof of loss within sixty days from the time of the loss, then judgment is to be entered for the plaintiff in the sum of \$954, with interest thereon from the date of the writ; otherwise, judgment is to be entered upon the verdict."

M. Shapira, for the plaintiff.

F. W. Brown & W. L. Came, for the defendant, submitted a brief.

BRALEY, J. The policy issued by the defendant to the Henley-Kimball Company and the plaintiff's intestate insuring as their interest may appear for the term of one year an automobile against certain perils including theft of the car, required that in the event of loss or damage the assured should forthwith give notice in writing to the company or the authorized agent who issued the policy, and within sixty days thereafter, unless the time was extended in writing, render a statement signed and sworn to by the assured stating the time and cause of the loss. If the assured failed to render such statement within the time specified or as extended, his failure "shall render such claim null and void." The car was stolen. It is undisputed that the time never was extended, and the intestate, without having rendered a statement, died more than sixty days after the date of loss. But the defendant nearly six months thereafter, having paid to the Henley-Kimball Company, which also had failed to render a statement, the amount of its insurable interest, and the jury having found that the automobile had not been used by the intestate to carry passengers for hire, a use expressly prohibited by the policy, the plaintiff claims as matter of law that the payment operated as a waiver of any statement by his intestate, and that he is entitled to the amount of insurance with interest as stipulated in the report.

The car was in the possession of the intestate under a conditional sale from the Henley-Kimball Company, by the terms of which a certain part of the purchase price had been paid in cash while the balance was payable in instalments. It was further provided that the conditional vendor should effect the insurance and pay the premium which was to be added to the price, and upon the final payment of the entire indebtedness a bill of sale was to be given. It is contended by the defendant that their relation was analogous to that of mortgagor and mortgagee under a policy made payable to the mortgagee as his interest may appear, and their

interests being several, the contract of insurance could be enforced by either to the extent of his rights in the property, and a settlement with one would not bar the rights of the other if compliance with the precedent condition were shown. See *Copeland v. Mercantile Ins. Co.* 6 Pick. 197; *Tate v. Citizens' Mutual Life Ins. Co.* 13 Gray, 79; *Palmer Savings Bank v. Ins. Co. of North America*, 166 Mass. 189; *Swaine v. Teutonia Fire Ins. Co.* 222 Mass. 108, 110; *Beebe v. Ohio Farmers' Ins. Co.* 93 Mich. 514.

It is unnecessary, however, to determine the nature or scope of the contract, for on the record neither party had any enforceable rights. The payment therefore was a mere gratuity which did not operate as a relinquishment by the defendant of the right in the present action to insist upon a compliance with the terms of the policy. *Rundel & Hough v. Anchor Fire Ins. Co.* 128 Iowa, 575.

Judgment for the defendant on the verdict.

HELLIWELL GARAGES, Incorporated, vs. BENJAMIN FEINBERG.

Suffolk. January 13, 14, 1920. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Attachment, Officer, Keeper. Practice, Civil, Costs.

In an action where an attachment was made of an automobile stored upon premises of the plaintiff and, without removing the automobile, the officer placed it in the custody of a keeper and at the end of ten days removed it to another part of the plaintiff's premises where it was secured by a chain fastened and locked across the rear wheels, the trial judge as a part of the plaintiff's taxable costs allowed the officer's charges of \$10 for custody and \$60 for keeper and disallowed \$17 claimed for storage. *Held*, that under St. 1913, c. 611, § 1, a charge of \$10 for custody was permissible and that, the allowance of \$60 for keeper not being a manifest error of law, was not reviewable by this court, it being within the discretion of the judge to allow for a keeper's charge an amount in excess of \$2 a day for ten days.

CONTRACT with a declaration upon an account annexed for \$74 alleged to be due to the plaintiff for storage of the defendant's automobile. Writ in the Municipal Court of the City of Boston dated February 20, 1919.

At the trial in the Municipal Court the judge found that the plaintiff was entitled to recover the amount claimed for storage. Later there was a hearing before the judge upon the question of taxation of costs. The evidence at the hearing is described in the opinion.

The defendant disputed the right of the plaintiff or of the attaching officer to incur expenses for keeper's fees, custody and storage charges under the circumstances stated, and requested the following rulings:

"1. That an officer has no right to make use of the tenement of one person to keep goods attached on a writ against another for a longer period than is reasonably necessary to remove them.

"2. That the permanent stationing of a keeper of attached property is not warranted by law, and a charge therefor cannot be legally included in the taxable costs.

"3. That on all the law and facts of the case the constable's charges for fees for custody should be disallowed.

"4. That on all the law and facts of the case the constable's charges for fees for keeper should be disallowed.

"5. That on all the law and facts in the case the constable's charges for fees for storage should be disallowed."

The judge denied the first ruling, found that the second ruling was not in accordance with the facts in the case, denied the third and fourth rulings, and made the fifth ruling. He found that the officer's fees should be taxed at \$74.50, which included \$3.50 for copies and service of the writ and travel and \$71 for attachment, custody and keepers, and reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

St. 1913, c. 611, § 1, reads as follows:

"The fees of sheriffs, deputy sheriffs, and constables for the service of civil process shall be as follows. . . .

"For the custody of personal property attached, replevied or taken on execution, not more than two dollars for each day of not more than eight hours for the keeper while he is in charge, and not more than one dollar a day for the officer for a period not longer than ten days; but the officer may be allowed a greater compensation for himself or for his keeper, or compensation for a longer period, by the written consent of the plaintiff and the de-

fendant whose property has been attached, replevied or taken upon execution, or by order of the court upon a hearing. . . ."

W. Charak, for the defendant.

D. B. Keniston, for the plaintiff.

BRALEY, J. The trial judge found that at the date of the attachment the defendant's automobile was stored on the premises of the plaintiff, where it remained during the entire period for which as part of the plaintiff's taxable costs the officer's charges for the attachment, custody and keeper's fees are claimed. The attachment being lawful, the charge therefor is in accordance with St. 1913, c. 611, § 1. The defendant, however, contends that charges for the custody of personal property is limited by § 1 to "not more than two dollars for each day of not more than eight hours for the keeper while he is in charge, and not more than one dollar a day for the officer for a period not longer than ten days," and that, the officer after ten days having discharged the keeper and moved the automobile from the third to the first floor of the building where it was secured by a chain fastened and locked across the rear wheels, his fees are excessive.

The return shows a charge of \$10 only for custody, which amount being permitted by statute, the defendant's complaint is restricted to the item for keeper's fees. The question of how much should be allowed where the claim is for more than ten days, is also regulated by the statute, which further provides, that "the officer may be allowed a greater compensation for himself or for his keeper, or compensation for a longer period . . . by order of the court upon a hearing." The amount, if greater compensation is asked, is expressly left to the sound discretion of the court, which is reviewable only for manifest error of law.

We are accordingly of opinion that the defendant's requests in so far as not given were rightly denied, and the rulings having been correct, the order dismissing the report should be affirmed.

So ordered.

EVA L. GOLDER vs. LOUVILLE O. GOLDER.

Suffolk. January 16, 1920. — March 5, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Marriage and Divorce. Husband and Wife. Conflict of Laws.

Where, at the trial of an action in Massachusetts on a judgment awarded the plaintiff by the Supreme Judicial Court of Maine in a libel for divorce, the laws of Maine relating to actions between husband and wife are not in evidence, the laws of Massachusetts govern.

In the absence of proof that the laws of Maine authorize actions between husband and wife, a woman cannot maintain in this State, during the pendency of a libel for divorce brought by her in Maine, an action against her husband upon a judgment of a Maine court for arrearage of alimony ordered to be paid to her *pendente lite*.

CONTRACT upon a judgment for \$800 of the Supreme Judicial Court for the State of Maine on an order issued by that court in an action of libel for divorce. Writ in the Municipal Court of the City of Boston dated September 18, 1918.

The defendant filed a motion to dismiss the action on the ground "that the plaintiff is and was at the time of the bringing of this action the wife of the defendant."

At the trial in the Municipal Court the defendant requested the judge to rule "that this action being brought by a wife against her husband cannot be maintained for want of jurisdiction of the court to entertain actions between husband and wife at common law. It being admitted in open court and by the pleadings and evidence that the plaintiff and the defendant are still husband and wife." The judge denied the motion to dismiss, refused the ruling requested, found for the plaintiff for the full amount claimed with interest and at the request of the defendant reported the case to the Appellate Division, who vacated the finding and ordered judgment for the defendant. The plaintiff appealed.

R. D. H. Emerson, for the plaintiff.

M. E. S. Clemons, for the defendant.

BRALEY, J. The defendant, while conceding the validity of the judgment on the interlocutory order awarding alimony to the

plaintiff in her libel for divorce which still is pending in the State of Maine, contends, that the present action brought in contract for the amount cannot be maintained.

If a final and absolute decree had been entered, the bonds of matrimony would have been dissolved, and the remedy at law would be complete. *Page v. Page*, 189 Mass. 85. *Wells v. Wells*, 209 Mass. 282, 288. *Taylor v. Stowe*, 218 Mass. 248. But in the absence of a final decree the parties are husband and wife. A right of action at common law originating in another State doubtless may be enforced here if jurisdiction of the defendant appears, and a right of action given by a statute of another State also is enforceable unless it is against the policy of our laws. *Howarth v. Lombard*, 175 Mass. 570, 572. *Converse v. Ayer*, 197 Mass. 443. *Walsh v. Boston & Maine Railroad*, 201 Mass. 527. The laws of Maine however relating to actions between husband and wife not appearing, the law of the forum governs. *Chicago Title & Trust Co. v. Smith*, 185 Mass. 363. *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104. *Sistare v. Sistare*, 218 U. S. 1, 26. And if by R. L. c. 153, § 6, as affected by St. 1910, c. 576, a married woman may sue and be sued as if she were sole, yet this provision "shall not authorize suits between husband and wife." It follows that the common law bars recovery. *Nolin v. Pearson*, 191 Mass. 283. *Atkins v. Atkins*, 195 Mass. 124, 128. The question whether she can proceed in equity is not before us. See *White v. White*, 233 Mass. 39.

The ruling of the trial judge that the plaintiff could recover was erroneous, and the order of the Appellate Division, that judgment should be entered for the defendant, must be affirmed.

So ordered.

BAY STATE DREDGING AND CONTRACTING COMPANY vs.
W. H. ELLIS AND SON COMPANY & others.

Suffolk. January 19, 1920. — March 17, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Mechanic's Lien. Public Work.

- A staging and falls, used in the work of painting and plastering a public pier and steel shed but not made a part thereof, are not labor performed or furnished or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77.
- A premium upon a policy of insurance against liability, issued to a contractor constructing a public building or work, is not labor or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77.
- A contractor engaged in the construction of a pier and steel shed for the city of New Bedford under a contract with the Harbor and Land Commissioners furnished a bond with surety in conformity with R. L. c. 6, § 77, as security for the payment of labor performed or furnished and material used in such construction. The work included a driveway on the pier and through the building, but the contractor was released from the construction of the driveway and it was completed by another contractor under a separate contract. The work, excepting the driveway, was completed on a September 4. The driveway was completed in October. In a suit brought by creditors to recover under R. L. c. 6, § 77, for labor performed or furnished and materials used in the construction of the work, it appeared in evidence that certain creditors had filed their claims previous to the September 4, and certain other creditors had filed their claims more than sixty days subsequent to that date but within sixty days after the completion of the driveway. The surety contended that any proof of claims filed previous to September 4 or subsequent to sixty days thereafter was not in compliance with the statute. *Held*, that the work referred to in the statute embraced the entire work contracted for when the security was given, whether completed by the original contractor or by another, and that claims filed at any time previous to sixty days after the completion of the driveway were seasonably filed.

BILL IN EQUITY, filed in the Superior Court on March 15, 1917, and later amended by a creditor of W. H. Ellis and Son Company in behalf of itself and all other creditors who might be permitted to join as parties plaintiff under R. L. c. 6, § 77, to recover for labor performed or furnished and for materials used in the construction of a pier and steel shed in the city of New Bedford under a contract between the Commonwealth of Massa-

chusetts acting by the Board of Harbor and Land Commissioners and W. H. Ellis and Son Company.

Petitions to intervene were filed by Charles S. Ashley and Sons Company, Joseph P. O'Connell, and William C. Briggs and Charles E. Beckman, copartners doing business under the firm name of Briggs and Beckman, the Central Lumber and Supply Company, the Coburn Trolley Track Manufacturing Company, Joseph Langlois, the Trussed Concrete Steel Company and the Boston Sand and Gravel Company. Edmund Wood and George R. Wood, copartners as Green and Wood, the Sullivan Granite and Construction Company, and Flavien Cote filed separate petitions in substantially the same form as the petition of the Bay State Dredging Company, and these proceedings were by orders of the court consolidated with and merged into this proceeding.

The suit was referred to a master, who filed a report. A motion to recommit the report and exceptions to it, raising questions not material to this decision, were heard by *J. F. Brown, J.*, by whose order an interlocutory decree was entered denying the motion, sustaining the exceptions in part, modifying the report accordingly, in matters not material to this decision, and confirming it as modified. Thereafter the suit at the request of the parties was reserved for determination by this court upon the pleadings, the master's report, the exceptions to the master's report and the interlocutory decree.

Material findings of the master are described in the opinion. The only questions argued in this court were whether certain plaintiffs seasonably filed proofs of claim, and whether the plaintiffs Joseph Langlois and Charles S. Ashley and Sons Company performed labor and furnished material of such a character as to permit them to recover in this proceeding.

R. L. c. 6, § 77, is as follows: "Officers or agents who contract in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents, a sworn statement of his claim, within sixty days after the completion of the work."

F. L. Norton, for J. P. O'Connell.

G. H. Brown, for the Trussed Concrete Steel Company.

D. J. Triggs, for Edmund Wood and George R. Wood.

J. E. McConnell, (*E. P. Fitzgerald* with him,) for the National Surety Company.

PIERCE, J. This is a bill in equity brought by the plaintiff in behalf of itself and of all other creditors of the defendant W. H. Ellis and Son Company who may be permitted to join as parties plaintiff against W. H. Ellis and Son Company, the Commonwealth of Massachusetts and the National Surety Company, under R. L. c. 6, § 77, to recover for labor performed or furnished and for materials used in the construction or repair of a pier and steel shed in the city of New Bedford under a contract dated January 5, 1915, between the Commonwealth of Massachusetts, acting by its Board of Harbor and Land Commissioners, and W. H. Ellis and Son Company, and is before this court on a reservation from the Superior Court. No question is raised as to the validity of the contract.

On January 6, 1915, W. H. Ellis and Son Company, as principal, and the National Surety Company, as surety, in pursuance of the contract and of the statutes of the Commonwealth, executed and delivered to the Commonwealth of Massachusetts a bond conditional upon the payment by it for labor performed or furnished and for materials used in the construction or repair of said public work. Thereafter the Ellis company began work under said contract, and from time to time entered into sub-contracts with the remaining intervening plaintiffs to furnish materials and perform labor of various kinds in connection therewith. While the work was progressing under the contract, on April 11, 1917, the Commonwealth of Massachusetts, acting by the Commission on Waterways and Public Lands, which commission had succeeded to the powers and duties of the Harbor and Land Commission, entered into a written modification of the original contract with the Ellis company, which modification released the Ellis company from its obligation under the contract to construct a driveway through the centre of the pier and through the shed, of vitrified paving brick, wood blocks or granite blocks.

When the contract was thus modified, the driveway had been filled with dirt, but had not been surfaced in any way. Regard-

ing the driveway the master found that the Commonwealth of Massachusetts always intended to have it constructed; that it was an important portion of the public work being constructed and was reasonably necessary to its efficient use; that the commission had not fully decided as to the method of construction when the contract was modified at the request of the Ellis company; that the commission then stated to the Ellis company that "they proposed to re-advertise for bids for the driveway;" that it was re-advertised in a manner "to change the original method [of construction] as provided in the original Ellis company contract, by laying a concrete surface over a portion of the driveway, viz., under the shed and across the end of the pier." This method was adopted and executed by another contractor under a new contract concerning this particular work. The work contracted to be done by the Ellis company under the contract of January 5, 1915, as modified by the agreement of April 11, 1917, was completed on September 4, 1917. The driveway under the new contract was constructed and completed some time in October, 1917, by the new contractor, in the method advertised after the release of the Ellis company from its contract in relation to its construction. After the entry of the petition the plaintiff and one intervenor settled their claims against the defendants, and the suit is prosecuted by the remaining intervenors.

At the hearing before the master there was evidence and the master found that the various plaintiffs filed with the Harbor and Land Commission or their successors, the Commission on Waterways and Public Lands, claims against the Ellis company in the proper form and in compliance with the statute, except as to the question whether some of them were seasonably filed; and the issues now presented are whether certain of the plaintiffs seasonably filed proofs of claim, and, as to certain of them, (Joseph Langlois and Charles S. Ashley and Sons Company,) whether the labor performed and materials furnished are of such a character as to permit them to recover in this proceeding.

The claim of Langlois is for the use of a staging and falls which were reasonably used by a subcontractor of the Ellis company in the necessary work of painting and plastering upon the pier and steel shed. They remained upon the premises after the completion of the work of painting and plastering, were damaged and ren-

dered unfit for use, and their whereabouts became unknown before the plaintiff or the subcontractor was notified to remove them. They were not incorporated in the building, and the mere use of an appliance, however necessary or useful it may be to the prosecution of a contract for "the construction or repair of public buildings or other public works," is not labor performed or furnished or material used in such construction or repair within the reasonable intendment of R. L. c. 6, § 77. The claim has no standing under R. L. c. 6, § 77. *Kennedy v. Commonwealth*, 182 Mass. 480. *Thomas v. Commonwealth*, 215 Mass. 369.

The claim of Charles S. Ashley and Sons Company is for a premium on an insurance liability policy issued to the Ellis company; it is not for labor or material performed or furnished, and is not within the statute. *Kennedy v. Commonwealth*, *supra*. *Sampson v. Commonwealth*, 202 Mass. 326. *Friedman v. County of Hampden*, 204 Mass. 494.

The remaining claims which are contested fall into one or the other of two classes: (1) those wherein the sworn statements of claims were filed before September 4, 1917, and (2) those wherein the sworn statements of claims were filed more than sixty days after September 4, 1917. The defendant National Surety Company contends that the statute is in derogation of common right, should be strictly construed, and that so construed the sworn statement of every claimant under the statute must be filed within the period of sixty days which begins September 4, 1917, and ends November 3, 1917. Assuming, without deciding, that the statute in question in analogy to the construction of mechanic lien statutes is to be construed strictly, as to which see *Gale v. Blaikie*, 129 Mass. 206, 209; *Whalen v. Collins*, 164 Mass. 146; *Angier v. Bay State Distilling Co.* 178 Mass. 163; *Pratt & Forest Co. v. Strand Realty Co. of Lowell*, 233 Mass. 314; *Nash v. Commonwealth*, 174 Mass. 335, 182 Mass. 12; *Burr v. Massachusetts School for Feeble-Minded*, 197 Mass. 357; *Friedman v. County of Hampden*, 204 Mass. 494; *E. I. Dupont De Nemours Powder Co. v. Culgin-Pace Contracting Co.* 206 Mass. 585; *Philadelphia v. Fidelity & Deposit Co. of Maryland*, 231 Penn. St. 208; Ann. Cas. 1912 B 1085 note, no one could be injured in the legal sense if a claim within the terms of the statute was filed with the designated officer or agent of the Commonwealth at any time within sixty

days after labor had been performed for or material had been furnished to the contractor. The contractor and his creditors could not be injured because the filing of the sworn statement before the completion of the work covered by the principal contract could have no legal effect to establish the debt, to create a lien or to accelerate the time at which the laborer or materialman would be entitled to obtain the benefit of the security which the statute requires the agents of the Commonwealth to obtain of the contractor. The effect of the filing of the statement before the completion of the work would permit of that statement becoming operative under the statute the moment when the work of the contractor was in fact completed, or when by abandonment, release or otherwise it was in legal contemplation completed; and would save the laborer and materialman the risk of a mistaken, premature or belated filing of claim. *Young v. The Orpheus*, 119 Mass. 179. *Reardon v. Cummings*, 197 Mass. 128. See *Atherton v. Corliss*, 101 Mass. 40.

The filing of the sworn statements was seasonable and within the statute. The work to be completed as a condition to the right to have the benefit of the security, upon the filing of a sworn statement within sixty days after the completion of the work, plainly refers to the public work embraced within the terms of the contract as it existed when the contractor or subcontractor was required to furnish sufficient security for the labor and material to be performed or furnished; and the right to have the benefit of that security enured to any laborer and materialman who should furnish labor or material which was used or employed in the construction or repair of the public work if he should file a sworn statement of his claim within sixty days after the completion of the work contemplated by the original contract, even if it be not completed by the original contractor.

The interlocutory decree confirming the master's report as modified is affirmed. The cause is remanded to the Superior Court to establish the debts of the several plaintiffs, and to establish the form of the decree in accordance with this opinion.

Decree accordingly.

FOLSOM ENGRAVING COMPANY vs. WILLIAM MCNEIL & others.
WRIGHT COMPANY vs. SAME.

Suffolk. November 18, 1919. — March 20, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Labor Union. Strike. Unlawful Interference. Equity Pleading and Practice.

A contract submitted by a labor union to an employer, whereby, after its acceptance, preference in employment would be given to union workmen by notifying the union officials when additional journeymen and apprentices were needed and all contracts of employment would be submitted and executed in accordance with the union's by-laws and constitution, in effect would force the employer to maintain a shop in which were employed only union workmen, although the contract also provided that, if the union could not furnish and supply competent help, the employer might secure such help from other sources. The officers of a labor union endeavored to persuade an employer, maintaining "a shop in which were employed both union and non-union workmen," to enter into an agreement with the union establishing hours, wages and conditions of work, under which preference in employment would be given union workmen and all contracts of employment would be submitted and executed in accordance with the union by-laws and constitution, no employee of six weeks' standing would be laid off temporarily owing to slackness of work, and all disputes, with the exception of those arising from wages, hours and apprenticeship rates, would be submitted to an arbitration committee composed in part of members of the union. The employer refused to consider the contract and the officers of the union thereupon called a strike in the employer's shop, established picketing and caused letters to be sent to the employer's customers and employees urging a boycott of the employer. In a suit in equity brought by the employer against the officers and members of the labor union, it appeared that the picketing was conducted in a coercive manner with threats and scurrilous language for the purpose of rendering the employment of the employees uncomfortable or unbearable and of causing them to leave their employment, and that the purpose of the strike and boycotting letters was to compel the employer to accept the union agreement. *Held*, that

- (1) The purpose of the strike was unlawful;
- (2) The officers and members of the union were not protected by St. 1913, c. 600, which was applicable only to a lawful strike lawfully conducted;
- (3) The employer was entitled to injunctive relief.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court on June 23, 1919, to enjoin the officers and members of the Photo Engravers' Union of Boston from prosecuting or encouraging a strike in the plaintiffs' establishments, interfering with employ-

ment contracts of the plaintiffs or otherwise endeavoring to compel the plaintiffs to enter into a contract with the union.

Without the filing of answers by the defendants, the suits were referred to a master "to hear the parties and their evidence upon the question of the issuing of a preliminary injunction as prayed for, to find the facts, and report thereon to the court." The master filed a first report and, after its recommittal to him, a supplemental report.

Material parts of the contract which the union desired the plaintiffs to agree to were as follows:

"In order to secure careful and competent fellow servants and to diminish so far as possible the risks and dangers incident to those engaged in the art of photo engraving, the employing photo engravers of Boston agree that in their employment of journeymen and apprentices they will give preference to the members of the Boston Photo Engravers' Union, No. 3, I.P.E.U., by notifying the Union officials when additional journeymen or apprentices are needed. If the Union cannot furnish and supply competent help, the employer may secure such help from other sources.

"And it is distinctly understood and agreed that the said employing photo engravers shall assist the officials of the Boston Photo Engravers' Union, No. 3, I.P.E.U., in having their members comply with all their obligations to said Union. . . .

"That forty-eight hours shall constitute a full week's work. The working hours shall be between 8 A.M. and 6 P.M. for day work and between 5 P.M. and 8 A.M. for night work. That the quitting time on Saturday shall not be later than 12:30 noon. Jan. 1, 1920, 44 hours shall constitute a week's work.

"Should it be deemed necessary to reduce the working hours this can only be done provided the notice of such change be given at least one week prior to reducing said working hours. Such reduction shall be equal on each day of the week and shall affect the entire working force and that the regular overtime rates be paid for all such work as may be done outside of the hours designated as working hours in said reduction.

"That those employed in a permanent position are not to be laid off temporarily owing to slackness of work. A permanent position to be considered when an employee has been employed for a period of six consecutive weeks. . . .

"That all disputes that may arise, not covered by this agreement, shall be submitted to an Arbitration Committee consisting of two from each party to this agreement, and if this committee shall fail to agree, then said four members shall choose a fifth, who shall be a disinterested party. Said fifth member shall be chosen by said four members within ten days from their failure to agree. Said Committee shall render its decision within three weeks from the time of the appointment of said fifth party.

"During the time of said arbitration, no strikes or lockouts shall be engaged in by either party to this agreement. Wage scale, hours and the apprentice ratio as well as the Constitution and Laws of the Boston Photo Engravers' Union of N.A. and the Constitution and By Laws of the I.P.E.U. shall not be subject to arbitration.

"That no contracts, individual or otherwise, conflicting with this agreement be entered into, and all contracts of employment must be submitted and executed in accordance with the By Laws and Constitution of the I.P.E.U.

"This agreement shall be in effect from April 22, 1919, to April 21, 1920, and shall continue from year to year unless either party gives a thirty-day notice of their desire to change."

Material findings of the master were as follows:

"Prior to the strike, both of the plaintiffs had employed in their shops such labor as was necessary to their work without regard to whether the employees were or were not members of labor organizations. When the strike was inaugurated a large part of the force in each of the shops quit work and went on strike. Some of the employees who quit work were members of the Photo-Engravers' Union and some were not. Some were members of other labor organizations and a few were not members of any organization.

"After the inauguration of the strike, the plaintiffs secured men and women to work in their shops to fill, so far as possible, the places of the employees who had gone on a strike. . . .

"Every business day since the strike was inaugurated groups of men numbering from two or three to more than a dozen have congregated about or near the entrances of the places of business of the plaintiffs at the hours of opening and closing and during the noon hour and have sought to talk with employees as they

came to or left the places of business. These men were not all of them identified by the evidence as being members of the union, but it was made to appear from the evidence that the larger part of them were members of the union and were acting under instructions by the strike committee of the union. . . .

"Without attempting to go into all the specific instances I find that it is almost of daily occurrence that men who were employed in the shops of the plaintiffs have been approached by the pickets and asked to leave their work and join the strikers; that in all instances when employees were approached for the first time they were addressed in a respectful manner by the pickets, who sought to argue with them and to convince them of the justness of the cause of the strikers; that in some instances these methods were successful, but that in other instances the employees declined to talk with the pickets and requested that the pickets refrain from attempting to talk with them, but the pickets insisted that they should talk with them and have assembled about the employees in groups of sufficient numbers to make progress of the employee upon the streets difficult and unpleasant, and have talked in loud tones and have used language to the employee which was disagreeable and even abusive; that in some instances when an employee had plainly told the pickets that he did not care to talk with them, groups of the pickets numbering from two to five or six have followed the employee along the streets for a long distance, and into restaurants and street cars, and to their homes; that in some instances the persons who were following an employee have talked in loud tones and used language which attracted public attention to the employee and embarrassed him; that in some instances persons who were in the groups have called employees 'strike-breakers,' 'scabs,' 'dirty rats,' 'son of a b—,' and other vulgar names, accompanied by profanity; that in one instance two of the employees of the Folsom Company were followed by two men for a long distance upon the public streets, during which time the men who were following repeatedly called them objectionable names and, while one of the employees was talking with a lady acquaintance whom he met, one of the men who were following approached and said in a tone which could be heard by the lady, 'My girl would n't talk with a strike breaker,' and that upon leaving the lady and walking a little further upon

the street one of the men who were following struck one of the employees, but the man who made the assault was not known to the employee and it was not made to appear whether he was one of the defendants, though it was made to appear that the other man who was with him was one of the defendants; that in one instance an employee of the Folsom Company who was also a professional dancer who secured engagements at public dance halls was repeatedly interviewed by the pickets and was told by one of the members of the union that, if he did not leave the employ of the Folsom Company, the defendants would see the proprietor of a dance hall at Revere Beach, where the dancer had been employed on one occasion and had promises of other engagements, and tell him not to again employ the dancer, and that since that time he has not been able to secure any engagements to dance at that hall; that in two or more instances employees have been told by men in the groups of pickets that unless they left their employment they would have 'their heads kicked in;' that one of the employees who had testified in the hearings was met by four pickets as he left the shop the night after he had testified and one of the pickets called him a 'G— d— son of a b—,' and one of the pickets said 'G— d— you. Look out for your life. You are going to get killed some day.' . . .

"From all of the evidence I find that the use of the methods employed by the pickets as hereinbefore related was for the purpose of rendering the employment of the employees of the plaintiffs uncomfortable or unbearable and thus cause them to leave their employment. . . .

"During the progress of the strike the strike committee of the union have from time to time sent circular letters to persons employing photo engravers in Boston and elsewhere; to persons employed by photo-engraving concerns; to printers and publishers; and to persons with whom the plaintiffs were doing business or would be likely to do business. . . .

"One of the circular letters which was sent to employees of the plaintiffs and others was as follows: 'Dear Sir: In carrying on our fight for the right of collective bargaining we have in mind a publicity campaign to the general public to leave all fair minded persons know the men who are in sympathy and those who are opposed to us in our efforts to better conditions. To do this we

are preparing a list which will contain the names and addresses and other interesting information of all men not friendly to our movement to be read at all union meetings and other organizations, social, fraternal, political otherwise. In this manner every person will be known in their true color amongst their neighbors and friends. We will appreciate hearing from you at your earliest convenience as to your intention of affiliating with this organization as we want this list to contain only the names of those who are not in sympathy with our movement and not abreast of the times and who will not concede and help in the fight of the workers to organize and protect themselves through the medium of an organization and by collective bargaining. This list of unfair workers will be prepared not later than Monday, May 5th. Very truly, Organizing Committee, Photo Engravers Union No. 3'

"A circular letter was sent to printers and publishers, and others, among whom were customers of the plaintiffs, which read as follows:

"Dear Sir: In these trying days when all good Americans are doing their level best to maintain industrial peace and the elimination of Bolshivism, it might interest you to know that there exists in the city of Boston in the Photo Engraving Craft a small group of employers who deny the right of the worker to organize, and in order to maintain their unfair attitude are paying wages to strike breakers and unskilled labor far in excess of what the skilled Bostonian asks. The justice of our cause may best be gauged by the fact that the Boston Typothetae Board of Trade made up exclusively of employing printers in a letter issued May 14th, 1919 has denied any connection with or interest in the attitude of the following firms, despite rumors or statements to the contrary. These below-named firms are attempting here in the city of Boston to foist upon us the policies of Lenine-Trotsky (rule or ruin).

American Engraving Co.

Burbank Engraving Co.

F. O. Clark Engraving Co.

W. J. Dobbinson Engraving Co.

Folsom Engraving Co.

Franklin Engraving Co.

High Engraving Co.

Journal Engraving Co.

Wright Engraving Co.

“Seventy-five percent of our members are at present employed under mutual understandings with employers who believe in American ideals. We ask your cooperation as a user of photo-engraving and respectfully urge that you patronize concerns who believe in the American principles of collective bargaining and justice to both employer and employees, are able to give you both quality and service. We will gladly supply you with a full list of such concerns.

“We trust that we will receive your earnest cooperation in eliminating Bolshivism from the printing industry.

“We have been denied the right of collective bargaining.

“We are NOT demanding a closed shop.

Yours for Americanism,

Organizing Committee,

Boston Photo Engravers Union No. 3.’”

After the filing of the reports of the master, the suits by agreement were reserved by *Loring, J.*, on the reports of the master for final determination by the full court on the merits.

St. 1913, c. 690, referred to in the opinion is as follows: “No person shall be punished criminally, or held liable or answerable in any action at law or in equity, for persuading or attempting to persuade by printing or otherwise any other person to do anything, or to pursue any line of conduct not unlawful or actionable or in violation of any marital or other legal duty, unless such persuasion or attempt to persuade is accompanied by injury or threat of injury to the person, property, business or occupation of the person persuaded or attempted to be persuaded, or by disorder or other unlawful conduct on the part of the person persuading or attempting to persuade, or is a part of an unlawful or actionable conspiracy.”

W. M. Noble, for the plaintiffs.

D. V. McIsaac, (*D. F. Dwyer* with him,) for the defendants.

BRALEY, J. The master reports that at a meeting of the local union, a voluntary association, of which the defendants are respectively the president and secretary, the other members being too numerous to be joined as parties though properly represented by the officers and members named, it was voted to submit to the “photo-engraving establishments of the city of Boston” a

form of proposed contract conferring on the union the absolute right of "collective bargaining," and of preferential employment with a minimum wage scale, and that permanent employees should not be temporarily "laid off" even if there was not sufficient work to keep them employed. It was further provided that the ratio of apprentices to journeymen should be immutably fixed and that all disputes not covered by the agreement should be submitted to an arbitration committee of two from each party, but, if they failed to agree, a fifth member was to be chosen by the committee. And "No contracts, individual or otherwise, conflicting with this agreement be entered into, and all contracts of employment must be submitted and executed in accordance with the" by-laws and constitution of the international photo-engravers union with which the local union was affiliated. The agreement having been presented to the plaintiffs who are engaged in the business of "photo-engraving" and whose workmen included a large number of union men, was not accepted. The union because of non-acceptance voted to strike, and the employees who were members of the union ceased to work, forcing the plaintiffs to secure in so far as possible men and women to succeed them, some of whom entered into written contracts of service.

The question for decision is not, whether an individual employee who has contracted to perform labor can abandon his contract, leaving his employer to whatever remedy in damages he may have. It is, whether by concerted action, using the strike as a mass weapon, the defendants could lawfully compel the plaintiffs to yield to their demands. The proposed agreement was presented as an entire contract to be unconditionally accepted. If the plaintiffs declined to enter into the agreement, the underlying purpose manifestly was to enforce acquiescence through the coercive power of a strike, which, even where there is both a legal and illegal purpose, is of itself illegal. *Baush Machine Tool Co. v. Hill*, 231 Mass. 30, 36. The provision that the employer must retain and pay more employees than were actually or reasonably required for carrying on his business, and that disputes not covered by the agreement must be submitted to arbitration, even if proper subjects for negotiation where the parties are willing to negotiate, were, until accepted, mere proposals, the refusal of which was wholly insufficient to justify the measures adopted

by the defendants. The plaintiffs could not be compelled to make an involuntary contract, or to substitute compulsory arbitration for due process of law. *Haverhill Strand Theatre, Inc. v. Gillen*, 229 Mass. 413. *Reynolds v. Davis*, 198 Mass. 294.

But these provisions, while material and important, comprise a part only of a general plan to compel the plaintiffs, who were employing non-union as well as union labor, "to unionize" their shops. The record states that, prior to the vote to strike which followed the declination of the agreement, no disagreement or controversy had arisen between the plaintiffs and their workmen. It is true the agreement reads, that the plaintiffs in the employment of journeymen and apprentices will give preference to union men by notifying the union officials when additional journeymen and apprentices are needed, and if the union cannot furnish and supply competent help, the employer may secure such help from other sources; and no express requirement is found for the discharge of non-union men already under employment. No prolonged discussion however is needed to make plain that this was merely an indirect method which must culminate in a closed shop. The position of non-union employees under the practical working of the agreement would gradually become so unbearable and intolerable that, as they retired and were gradually eliminated by the process of selection, the plaintiffs necessarily must resort solely to union workmen to recruit their industrial force. It is unnecessary to consider what the status of the parties would have been if the agreement had been mutually accepted and executed. See *Minasian v. Osborne*, 210 Mass. 250; *Hoban v. Dempsey*, 217 Mass. 166; *Shinsky v. O'Neil*, 232 Mass. 99; *Smith v. Bowen*, 232 Mass. 106.

The right of the plaintiffs at all times to hire in the labor market, and to retain in their employment, such workmen as they might choose, unhampered by the interference of the union acting as a body through the instrumentality of a strike, or of a boycott, or of a black list, is a primary right which has never been abrogated but remains unimpaired by our decisions. *W. A. Snow Iron Works, Inc. v. Chadwick*, 227 Mass. 382, 389. *Folsom v. Lewis*, 208 Mass. 336. The distinction between the cases at bar and *Pickett v. Walsh*, 192 Mass. 572, and kindred decisions, where the strike was inaugurated for the sole purpose of getting

all the work on a particular job for members of the union who already had obtained a part of it, and a strike for the purpose of doing away with non-union labor altogether, and, by gaining a general monopoly of the labor market, to force employers to deal only with union men, is plain. The master reports that in furtherance of their efforts to bring the plaintiffs to terms, picketing, as well as intimidation of employees who continued to work for the plaintiffs by the use of scurrilous language and abusive epithets, and individual boycotting have been resorted to in various forms more or less offensive and oppressive. It is also found that strenuous attempts have been made to induce workmen, employed by the plaintiffs to take the places of the strikers, to break their contracts of employment, and to depart from the city, and to remain in other localities. But, not satisfied with these methods insistently practised, the report further states, that the defendants in various printed or written communications characterized and held up the plaintiffs as being unfair to and prejudiced against union labor, and have endeavored by a circular letter to persuade their customers to boycott the plaintiffs and to cease business dealings with them.

The St. of 1913, c. 690, an act to define the extent to which peaceful persuasion is permitted, is invoked as a shield for what has been done. But the statute is applicable only to a lawful strike lawfully conducted. It is unavailing as a defence on the present record. The prayer for the assessment of damages has been waived, and, the defendants having deliberately, intentionally and unlawfully entered upon a course of procedure materially interfering with the right of the plaintiffs unmolested to carry on business in their own way, the plaintiffs are respectively entitled to a decree with costs awarding injunctive relief, the terms to be settled by a single justice. *Berry v. Donovan*, 188 Mass. 353. *Cornellier v. Haverhill Shoe Manuf. Association*, 221 Mass. 554. *Shinsky v. Tracey*, 226 Mass. 21. *W. A. Snow Iron Works, Inc. v. Chadwick*, 227 Mass. 382. *Martineau v. Foley*, 231 Mass. 220.
Ordered accordingly.

MARK H. CREHAN vs. ROY C. MEGARGEL & others.

Suffolk. November 19, 1919. — March 20, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Stockbroker. Agency. Conversion. Contract, Performance and breach. Evidence, Burden of proof. Conflict of Laws.

- A Massachusetts stockbroker has the legal title to securities acquired by him under a contract, made with a customer who is a resident of Massachusetts and to be performed here, by the provisions of which the stockbroker is to receive, buy, sell and carry securities on margin; and, the customer being without a right to immediate possession, the stockbroker, if he uses the securities for his own purposes, is not liable to the customer in an action of tort for conversion.
- A Massachusetts stockbroker, who has acquired securities under an agreement with a Massachusetts customer, made and to be performed in Massachusetts, whereby the stockbroker is to receive and carry securities as margin for the customer's account, if he fails to carry the securities as margin and uses them for his own purposes, may be charged with their value in an action by the customer for money had and received.
- In an action against a stockbroker by a customer for breach of an agreement to receive, buy and sell, and carry securities on margin, the burden rests on the stockbroker to prove that he had in his possession or control at all times, available for delivery to the plaintiff, the securities which he purported to be carrying for him.

CONTRACT OR TORT against a firm of stockbrokers, with a declaration as amended in two counts, the first count being in tort for the conversion of certain securities, and the second in contract for \$1,505,577.94, money alleged to have been had and received by the defendants to the plaintiff's use. Writ dated January 20, 1917.

The case was heard in the Superior Court by *Raymond, J.*, upon the auditor's report, which was the only evidence introduced. Material portions of that report and questions of law raised in this court are described in the opinion.

The judge made alternative findings as follows: "I find that the facts set forth in the auditor's report are true. I find for the plaintiff under the first count in his declaration and assess damages on the principles followed by the auditor in the sum of \$80,309.07 including interest to September 20, 1919.

"If my ruling that the defendants are entitled to mitigation of damages to the extent of the same percentage of the plaintiff's indebtedness on June 20, 1916, that the value of sixty-four hundred shares of Butte and Superior on that date bears to the total value of all of the securities, cash payments and dividends appearing to the credit of the plaintiff on the defendants' books on that date, is wrong, then I rule that the defendants are estopped to deny that the amount of the indebtedness of the plaintiff to the defendants at the date of the writ was \$198,664.96 and deducting that from the value of the plaintiff's stock converted, I assess damages under the first count in the sum of \$440,860.85. The defendants duly excepted to this ruling.

"If my ruling that the plaintiff is entitled to recover under the first count of his declaration is wrong, I find for the plaintiff under the second count in his declaration and find that the defendants should account to the plaintiff for and that the plaintiff should recover from the defendants \$542,634.59. This finding is the result of subtracting from the value of the total consideration delivered by the plaintiff to the defendants at the times of delivery as shown in the auditor's report, the amount of the plaintiff's indebtedness paid by the defendants to obtain possession of some of the securities delivered and also the payments of cash by the defendants to the plaintiff thereafter, to which I add interest from the date of the writ to September 20, 1919, amounting to \$85,-821.53, making a total of \$628,456.12."

The judge then reported the action to this court for determination.

W. D. Gray, for the defendants.

S. R. Wrightington, for the plaintiff.

DE COURCY, J. The plaintiff's alleged claim grows out of certain stock transactions handled by the defendants as his brokers. They are a limited partnership, organized under the laws of the State of New York, having their principal office in New York City, with branches in Boston and Chicago. Previous to the opening of his account with them the plaintiff had a margin account with Nickerson and Company, a stock-brokerage house in Boston. In April, 1916, on orders given by him, the securities which he had on margin were transferred from Nickerson and Company to the defendants, the latter paying to Nickerson and

Company the amount of the indebtedness for which the plaintiff's securities were held as margin.

The plaintiff's account with the defendants was a margin account, and ran until December, 1916. He visited their Boston office practically every day. Most of the orders to buy and sell were signed in the plaintiff's name by one Kane, an employee of the defendants, whose advice he followed. During the summer, fall and early part of the winter, the market was falling; in December the defendants called upon the plaintiff for additional margin; and on his failure to comply, they sold or pretended to sell practically all of his securities during that month.

The plaintiff does not make his claim under the so called wagering contract statute, R. L. c. 99. He brings his action to recover the value of the securities received by the defendants from Nickerson and Company, and certain items of cash and securities subsequently delivered to them by the plaintiff, and dividends credited to him on the books of the defendants.

The oral contract between the parties, as found by the auditor, was in substance as follows: "The defendants agreed to, and did in fact, accept from the plaintiff through deliveries made by Nickerson and Company, certain of the shares of stock described in the account annexed to the plaintiff's declaration. They agreed to, and did in fact, pay Nickerson and Company the amount that the plaintiff was indebted to Nickerson and Company at the time of the transfer of the account. The plaintiff understood that, in order to finance this transaction, the defendants would be obliged to borrow a substantial amount from some bank. This the defendants did, and the plaintiff assented to the use of such securities as the defendants deposited as collateral security for such loans. The defendants agreed that all of the securities delivered by Nickerson and Company, and any other assets which thereafter entered into the plaintiff's account, should and would be carried by the defendants to the credit of the plaintiff as marginal security for whatever trading in stocks the plaintiff might carry on through the defendants as brokers. They agreed to execute such orders to buy or sell as the plaintiff might give, so long as the plaintiff kept his margin good. The plaintiff, on his part, agreed to maintain at all times the amount

of margin required by the defendants, and to be bound by the lawful rules and customs of the stock brokerage business."

Among the securities transferred from Nickerson and Company to the defendants were seventy-three hundred shares of Butte and Superior; and he bought three hundred shares while his account was with them. By June 20, they had not in their possession or control any of this stock, although no orders to sell it were given by the plaintiff or Kane. The evidence tended to show that this stock was used to make deliveries on the "Armstrong" account, which was always a "short" account, and was manipulated by the defendant Coombs. But even if we assume, as the auditor finds, (so far as it is a question of fact,) that the defendants, through the "short" sales in the Armstrong account, "converted, either under the Massachusetts or New York law, all of the plaintiff's shares of Butte and Superior delivered to them as margin to their own use," he cannot recover on his count in tort for conversion. As the trial judge ruled, the question whether the defendants converted this stock is to be determined by Massachusetts law. The contract between the parties was made, and was to be executed, in Boston. The securities received as margin were taken over from another Boston broker, they were mostly acquired here, and the orders to buy and sell were given by a resident of this State at the Boston office of the defendants. In accordance with the long established rule of law in this Commonwealth, the legal title to the stocks carried on margin was in the brokers, as between them and their customer; and this is true alike of the stocks bought on margin by the defendants, and those deposited with them under the circumstances here disclosed when the account was transferred from Nickerson and Company. *Chase v. Boston*, 180 Mass. 458. *Furber v. Dane*, 203 Mass. 108. *Hall v. Paine*, 224 Mass. 62, 72, 73. As the plaintiff did not have the right to immediate possession of the securities alleged to have been converted, he cannot maintain an action of tort for conversion. *Raymond Syndicate v. Guttentag*, 177 Mass. 562. *Hodgkins v. Bowser*, 195 Mass. 141. The trial judge was wrong in ruling that the plaintiff could recover under the first count of his declaration.

The plaintiff is entitled to recover under his second count in contract. Under the agreement as found, it was the duty of the

defendants to hold the plaintiff's securities as margin, and to execute his orders to buy and sell. The burden rested on them to prove that they had in their possession or control at all times, available for delivery to the plaintiff, the stocks which they purported to be carrying for him. *Greene v. Corey*, 210 Mass. 536. *Adams v. Dick*, 226 Mass. 46. The most important item declared on is the sixty-four hundred shares of Butte and Superior. Instead of carrying this as margin, the defendants on or before June 20, 1916, wrongfully disposed of the stock for their own benefit, without the consent of or ratification by the plaintiff. And they failed to satisfy the auditor or judge that they actually purchased stocks, as ordered by the plaintiff, with the money advanced by him.

The difficulty in determining the damages is due largely to the fact that the figures in the record relate mostly to the claim for conversion. It appears, however, that the value of the plaintiff's securities turned over to the defendants in April, 1916, was \$1,264,883.17. He concedes that they should be allowed to deduct from this sum the amount of his indebtedness to Nickerson and Company, paid by the defendants in order to obtain the securities; and also that he should credit the defendants with \$34,130.70, which he received from them in cash during the running of the account. In addition the defendants are answerable for the plaintiff's cash payments, \$44,550.52. They also admitted on their books that they had received dividends on his account, amounting to \$196,144.25. The trial judge has found that the defendants in accounting to their principal, owe the plaintiff \$542,634.59, and interest thereon, based upon the above figures. We cannot say that the decision was not warranted. Judgment must be entered for the plaintiff on the count in contract, in accordance with the finding.

So ordered.

ARTHUR L. GILMAN vs. JOHN H. RAYMOND.

Suffolk. January 13, 1920. — March 20, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CARROLL, & JENNEY, JJ.

Assignment, Of wages, Of part of a debt. Municipal Court of the City of Boston, Appeal.

By St. 1909, c. 514, §§ 121-126, the rule of the common law, that wages to be earned under a contract of service not yet made are not assignable, was changed, and, under the provisions of that statute and its amendments, all wages earned by the assignor within two years from the date of the assignment from any person who might employ him during that period became assignable upon the requirements of the statute being satisfied. *Raulens v. Levi*, 232 Mass. 42, distinguished.

An assignment of wages in the statutory form required by St. 1909, c. 514, § 124, as amended by St. 1916, c. 208, § 2, which provided that "three fourths of the weekly earnings or wages . . . are exempt from this assignment," being an assignment of a part only of the debt due to the assignor, is not enforceable in an action at law by the assignee against one who employed the assignor during the two years covered by the assignment and who, although he received notice of the assignment, did not accept it, but refused to pay money to the assignee.

At the trial of an action in the Municipal Court of the City of Boston upon an assignment of wages, the trial judge erroneously refused to rule that the assignment was binding on wages earned by the assignor within two years even though, at the time when it was sought to enforce it, the assignor was in the employ of a person other than the one by whom he was employed at the time when it was executed, and found for the defendant. A report to the Appellate Division was dismissed and the plaintiff appealed. This court determined that, although the ruling asked for was a correct statement of the law, the plaintiff was not harmed by its refusal, because no action at law could be maintained upon the assignment due to the fact that it was an assignment of part only of a debt, three fourths of the assignor's wages being exempted by its provisions; and, under St. 1913, c. 716, § 1, ordered judgment for the defendant.

CONTRACT upon an assignment of wages to secure the payment of a debt of \$95 incurred in the purchase of merchandise. Writ in the Municipal Court of the City of Boston dated April 21, 1919.

The assignment, excepting the *in testimonium* clause, was as follows:

"Know all men by these presents.

"That I, Herman Tobias, of Boston in the County of Suffolk, for a valuable consideration paid to me by Arthur L. Gilman of

Boston, Massachusetts, the receipt of which I do hereby acknowledge, do hereby assign and transfer to said Arthur L. Gilman all claims and demands, not exempt by law (which I now have, and all) which within a period of two years from the date hereof I may and shall have against my present employer and against any person whose employ I shall hereafter enter (for all sums of money due, and) for all sums of money and demand which at any time within said period may and shall become due to me for services as cap maker. To have and hold the same to the said Arthur L. Gilman, his executors, administrators and assigns to secure a debt (1) of one hundred dollars (\$100.00) for goods actually furnished by the assignee amounting to one hundred dollars (\$100.00). (2) Contracted simultaneously with the execution of this assignment. (3) Three-fourths of the weekly earnings or wages, which are forty dollars (\$40.00), are exempt from this assignment."

The material facts appearing at the hearing in the Municipal Court are described in the opinion. At the close of the evidence, the plaintiff asked for the following rulings:

"1. Upon all the evidence the plaintiff is entitled to recover.

"2. St. 1909, c. 514, §§ 121-126, inclusive, as amended by St. 1916, c. 208, §§ 1-3, inclusive, binds all wages earned by the assignee within the statutory period whether, at the time the assignee files notice with the employer of the assignment together with a statutory account, the assignor is or is not then employed by the person by whom the assignor was employed at the time the assignment was executed and delivered to the assignee.

"3. If the court finds that the assignment in the case at bar is in the form required by law and that the plaintiff has done all acts necessary to bring himself within the requirements of the law relative to future wage assignments, it is immaterial whether the assignor be or be not employed by the person by whom he was employed at the time the assignment was given.

"4. St. 1909, c. 514, §§ 121-126, inclusive, as amended, binds all wages earned by the assignor within the statutory period, whether or not the assignor is employed by the person by whom he was employed at the time the assignment was executed.

"5. The intent and purpose of the legislative acts referred to is to bind to the assignee when the assignment is sought to be en-

forced, all wages earned by the assignor whether or not he, at the time the assignment is sought to be enforced, is or is not employed by the person by whom he was employed at the time the assignment was executed."

The trial judge refused to rule as requested, found for the defendant and, at the plaintiff's request, reported the case to the Appellate Division, who dismissed the report. The plaintiff appealed.

L. Marks, for the plaintiff, submitted a brief.

The case was submitted by the defendant without argument or brief.

DE COURCY, J. One Herman Tobias assigned to the plaintiff the wages that should become due to him during two years from January 7, 1918, from his then employer or from any person whose employ he should enter during that period. The assignment was in the standard form prescribed in the labor law, St. 1909, c. 514, § 124, as amended by St. 1916, c. 208, § 2. At the time of its execution Tobias was employed by George H. Staples, but was discharged by him on February 23, 1918. Since March 18, 1918, to and including the date of the writ, he has been in the employ of the defendant Raymond. At the trial in the Municipal Court the plaintiff requested the judge to rule, in substance, that the assignment was binding on the wages earned by Tobias within two years, even though, at the time when it was sought to enforce the instrument, Tobias was in the employ of a person other than the one by whom he was employed at the time it was executed. The requests were denied.

We are of opinion that the plaintiff was entitled to such a ruling. Undoubtedly at common law wages to be earned under a contract of service not yet made were not assignable. *Eagan v. Luby*, 133 Mass. 543. *Citizens Loan Association v. Boston & Maine Railroad*, 196 Mass. 528, 531. During recent years the Legislature has undertaken to regulate assignments of wages, in connection with the laws relating to labor and to the business of making small loans. By St. 1909, c. 514, §§ 121-126, certain requisites for the validity of such assignments were prescribed, and a standard form was enacted. It is significant that this form not only does not require the insertion of the name of the present employer, but it expressly purports to assign and transfer

"all claims and demands [which I now have, and all] which within a period of from the date hereof I may and shall have against my present employer, and against any person whose employ I shall hereafter enter, [for all sums of money due and] for all sums of money and demands which, at any time within said period may and shall become due to me, for services as ."

Section 126 reads: "Except as above provided, an assignment of wages made in accordance with the provisions of this act shall bind all wages earned by the assignor within the period named in such assignment." In view of this language, read in the light of the regulations provided by statute for safeguarding such assignments of wage-earners, we think it was the intention of the Legislature to change the common law doctrine, and while limiting the assignments to a period of two years, to broaden their scope so as to cover wages earned from different employers during that period. In the case of *Raulins v. Levi*, 232 Mass. 42, the statutory two years period expired while the suit was pending, and the defendant's right to enforce the assignment ceased. What was there said with reference to the effect of the assignor's change of service after the instrument was made, was based upon the concession of counsel for the defendant, quoted in the opinion.

The error in refusing to give the rulings requested, however, has not injuriously affected the substantial rights of the parties, and the finding for the defendant was right. It appears from the report that the plaintiff on April 1, 1918, sent to the defendant a copy of the assignment and a sufficient statement of the account in accordance with St. 1909, c. 514, § 122. The defendant employer, however, did not accept the order, and refused to pay money thereon to the plaintiff. We assume, for the purposes of this case, that St. 1910, c. 563, St. 1911, c. 727, § 22, and St. 1912, c. 675, § 6, which expressly require the written acceptance of the employer in order to make an assignment valid against him, are applicable only to assignments made to secure small loans, and do not apply to those which secure a sale of merchandise, such as the one in this case. See *Day v. Cohen*, 165 Mass. 304. But the assignment in question in terms exempted from its operation "three fourths of the weekly earnings or wages" of Tobias. See St. 1916, c. 208. It was in effect an order on the employer to pay one fourth of the weekly wages of his employee to this plaintiff.

Whatever rights in equity such a partial assignment may confer on the assignee (see *Andrews Electric, Inc. v. St. Alphonse Catholic Total Abstinence Society*, 233 Mass. 20), it could not, without the defendant's consent, split up the single and entire contract existing between him and his employee, Tobias, and subject him to several actions thereon at the instance of assignees of separate portions of the debt. The mere sending of a notice of the partial assignment to the defendant did not end or change his rights under the original contract with his employee. *Gibson v. Cooke*, 20 Pick. 15. *Papineau v. Naumkeag Steam Cotton Co.* 126 Mass. 372. *James v. Newton*, 142 Mass. 366. *Holbrook v. Payne*, 151 Mass. 383. *Security Bank of New York v. Callahan*, 220 Mass. 84, 87. *Mandeville v. Welch*, 5 Wheat. 277. Ann. Cas. 1912 A 673 note.

The order dismissing the report should be affirmed, and judgment entered for the defendant. St. 1913, c. 716, § 1. It is
So ordered.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY vs.
 ATTORNEY GENERAL & others.

Suffolk. January 21, 22, 1920. — March 22, 1920.

Present: DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Devise and Legacy. Trust, Charitable. Perpetuities, Rule against. Executor and Administrator. Massachusetts Institute of Technology.

A testator, after bequeathing an annuity to his step-mother and certain personal effects to a friend, devised and bequeathed the residue of his property to trustees, who were the same persons as his executors, to invest, reinvest and hold for a period not exceeding twenty-one years after his decease, adding income to principal until the fund should amount to the net sum of \$750,000, and, at the expiration of twenty-one years after the time of his decease, or sooner, should the accumulated fund amount to the net sum of \$750,000, then and in either event to pay over the entire net accumulated fund to the Massachusetts Institute of Technology for the purpose of founding and endowing a department of naval architecture and marine engineering to be called "Pratt School of Naval Architecture and Marine Engineering," "upon the express trust and condition" that, upon payment of the fund by the trustees to the Institute, it "shall forthwith erect upon its lands" a building, to be approved by the trustees, using such

portion of the fund for that purpose as might be necessary, the remainder of the fund to be held by the Institute "in trust forever, and the income therefrom is to be applied and used for the support and maintenance of said 'Pratt School,' and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance." *Held*, that

- (1) The trust estate vested in the Institute with the receipt of the fund;
- (2) The direction or condition that the building should be erected forthwith by the Institute after the receipt of the fund was a requirement that it should be erected within a reasonable time, having regard to the circumstances;
- (3) The erection of a building, during the World War, such as the state of development of naval architecture and marine engineering demanded, would have required an expenditure of money entirely disproportionate to the fund, and would have left an income inadequate to maintain the building or the school;
- (4) The legal title and the equitable title came into existence at once on the death of the testator, subject to the administration of the estate and the accumulation of principal and income to the net amount of \$750,000 within twenty-one years;
- (5) The entire residue of the estate, that is, all the estate except so much as was needed to be set apart to insure the payment of the life interest and the annuities, formed a trust for charitable uses, subject to be divested if the principal and accumulated income did not amount to \$750,000 on or before the expiration of twenty-one years;
- (6) The fund which was formed was not limited upon a life estate, but was all the rest and residue of property owned by the testator, some of which was subject to the life interests of individuals;
- (7) The provisions of the will constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust.

The will above described also contained a provision that "said building shall have suitably inscribed upon its outer walls the name 'Pratt School of Naval Architecture and Marine Engineering' and that a suitable bronze tablet bearing the inscription 'Presented by Charles Herbert Pratt to the loving memory of Eleazer Franklin Pratt, Catherine Blake Pratt and Franklin Stetson Pratt,' be erected in some appropriate place in the interior of said building." *Held*, that the direction to erect a memorial of bronze in the interior of the building was a mere incident in the construction of the building; and the testator's motive to commemorate himself and family did not prevent the main purpose from being charitable.

In a will, from the provisions of which it was clear that the purpose of the testator was to found and endow a school of naval architecture and marine engineering, the only provision touching directly upon the nature of instruction to be given in the school read, "and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance." *Held*, that it was plain that the word "insurance" was used inadvertently, and should be stricken out.

The next of kin of the testator in the will above described contended that they, and not the Massachusetts Institute of Technology, were entitled to any surplus above \$750,000 under the provisions of the will, but it was *held*, that the

manifest intent of the testator was to give the entire rest and residue of his estate to the charitable purpose defined in the will, subject only to the limitation that it should not be paid until it and the accumulated income reached the limit set, \$750,000, within twenty-one years after his decease.

A trustee, to whom has been devised and bequeathed real and personal property under a will of which he is also executor, and who is exempt from giving surety on his bond as trustee and executor, where the will provides that he is not to transfer the trust property to the beneficiary until it, with accumulations, has attained a certain amount, may acquire, before the allowance of his final account as executor, title to the personal property by any notorious act of himself as executor showing his election to hold the property thereafter as trustee, and, if the combined real and personal property then has attained the designated amount, he may convey the real estate to the beneficiary, who will thereby acquire a valid title.

BILL IN EQUITY, filed in the Supreme Judicial Court on October 16, 1917, and afterwards amended, for the sale of real estate by the residuary devisee under the will of Charles Herbert Pratt, late of Boston.

The fifth clause of the will of Charles Herbert Pratt to which reference is made therein is as follows:

"Fifth. All the rest and residue of my property and estate, real, personal and mixed, wheresoever the same may be situated and of which I may be possessed, or to which I may in any way be entitled at the time of my decease, I give, devise and bequeath unto my trustees hereinafter named, in trust to invest and reinvest the same, and to hold the same for a period not exceeding twenty-one years after the time of my decease, and to keep said rest, residue and remainder at all times securely invested so as to yield a regular income, and to add the income therefrom to the principal annually so as to form a fund which shall accumulate until the same shall amount to the net sum of seven hundred and fifty thousand dollars (\$750,000) — and at the expiration of twenty-one years after the time of my decease, or sooner, should said accumulated fund amount to the net sum of seven hundred and fifty thousand dollars (\$750,000.) then and in either event I direct my said trustees to pay over said entire net accumulated fund to the Massachusetts Institute of Technology, a corporation legally existing under the laws of this Commonwealth and at the present time located in the said City of Boston, for the purpose of founding or endowing in said Institute a department of naval architecture and marine engineering, the said department to be

forever called 'Pratt School of Naval Architecture and Marine Engineering,' but upon the express trust and condition that said fund shall be used and appropriated by the said Massachusetts Institute of Technology to the said uses and purposes in the following manner, namely: Upon the payment of the said fund by my said Trustees to it, the said Massachusetts Institute of Technology shall forthwith erect upon its lands a substantial building of a kind and appearance and according to plans and specifications to be first approved by my said Trustees, and for that purpose is to be used such portion of said fund as may be necessary; the remainder of said fund is to be held by said corporation in trust forever, and the income therefrom is to be applied and used for the support and maintenance of said 'Pratt School,' and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance. As it is my wish to perpetuate in some fitting and endearing manner the memory of my beloved father and his family, I direct that said building shall have suitably inscribed upon its outer walls the name 'Pratt School of Naval Architecture and Marine Engineering' and that a suitable bronze tablet bearing the inscription 'Presented by Charles Herbert Pratt to the loving memory of Eleazer Franklin Pratt, Catherine Blake Pratt and Franklin Stetson Pratt,' be erected in some appropriate place in the interior of said building, and it is my further will that should the name 'Pratt School of Naval Architecture and Marine Engineering' be ever in any way changed, said property and trust fund shall revert to my estate and said Institute shall have no further title thereto, and it is my further will that if for any reason the plan I have herein outlined for the erection and maintenance of said Pratt School cannot be carried out in the manner and form stated without the application of the doctrine of *cy pres*, it is my will that the fund herein provided for the founding and endowment of said Pratt School shall revert to my estate."

The court appointed a guardian *ad litem* of persons not ascertained or not in being, who were or might become interested in the subject matter of the suit.

The facts were agreed upon by the parties. The material facts are described in the opinion.

The suit came on to be heard by *De Courcy, J.*, and, by agreement of the parties, was reported by him upon the pleadings and the statement of agreed facts for determination by the full court.

C. F. Choate, Jr., (*C. Hunneman & C. P. Curtis, Jr.*, with him,) for the plaintiff.

W. H. Brown, (*R. T. Babson* with him,) for the defendants.

PIERCE, J. This is a petition of the Massachusetts Institute of Technology to sell real estate, conveyed to it by trustees appointed under the will of Charles Herbert Pratt, who died on May 7, 1912, testate. His will, on appeal from the Probate Court, after a trial to a jury, was admitted to probate by a decree of the Supreme Judicial Court on January 8, 1915, and the decree was filed in the Probate Court on January 29, 1915. The trustees under the will were duly appointed on February 18, 1915.

By his will the testator directed the payment of his debts and funeral expenses, the erection of a monument over his grave, and the care and maintenance of the monument and grave. He bequeathed an annuity of \$400 to his step-mother. He gave his collection of postage stamps to a friend interested in philately. And he gave all the rest and residue of his property "real, personal and mixed" to his trustees, who were the executors of his will.

The will disposed of real and personal property which came from three sources: first, that which belonged to the testator immediately; second, that which came to him from his father, in which his step-mother who survived him was entitled to a life interest in one third; third, that which came from his brother, in which his step-mother had a life interest in \$10,000. At the time of the testator's death, on May 7, 1912, the inventory of the special administrator showed the value of the personal property, less the life interest of the step-mother, to be \$243,805.49; and the value of the real estate, less the life interest of the step-mother, to be \$455,199.96. The executors' inventory, filed on July 29, 1915, showed the value of the personal property, less the life interest of the step-mother, to be \$304,922.59; and the value of the real estate, less the life interest of the step-mother, to be \$512,067.10; the total value of real and personal property being \$816,989.69.

During September or October, 1916, the interest of the step-mother in the properties was released in consideration of a cove-

nant of the Massachusetts Institute of Technology with Mrs. Pratt to pay her an annuity for her natural life, and the transfer to her of certain personal effects, the use of which was bequeathed to her for life by her late husband's will. The Institute of Technology also covenanted to pay certain relatives of the testator during the remainder of their joint lives and the life of the survivor of them the sum of \$1,200 per annum. On October 2, 1916, the trustees conveyed the real estate to the Institute of Technology. On October 12, 1916, the executors filed their first and final account. This account, not yet allowed, showed a transfer of personal property of the value of \$367,169.90 to themselves as trustees under the will. The trustees filed an account, not yet allowed, on October 12, 1916, beginning September 27, 1916, and ending September 30, 1916, in which they charged themselves with \$371,295.48; which is the sum, plus income, less an expense allowance of \$577.38, that the executors had transferred to themselves as trustees on September 27, 1916. On October 12, 1916, the trustees transferred the personal property to the Institute of Technology. The entire residue, real and personal property, received from the trustees by the Institute of Technology, was entered on the books of the Institute of Technology as having a value of \$935,000.

The defendants contend that the conveyance of the real estate and the transfer of the personal property by the trustees to the plaintiff, were not such transactions of an "entire net accumulated fund" as the testator, by the fifth clause of his will, intended should be formed by the trustees and paid over to the plaintiff when the accumulated fund should amount to \$750,000. They argue in support of this position that the value of the real estate alone was less than \$750,000, and that the title to the personal property could not be transferred by the executors to themselves as trustees, nor the value of the personal property be added to the value of the real estate to make an aggregate fund of at least \$750,000, until the allowance of the executors' account. *Welch v. Boston*, 211 Mass. 178, cited by the defendants, the earlier cases which that opinion affirms, and the later cases which follow it, establish beyond the peradventure of doubt that executors are liable to taxation as executors for the amounts given them as trustees until their account as executors, showing a distribu-

tion to themselves as trustees, has been allowed in the Probate Court. They also establish the rule that a surety on an executor's bond is liable on the bond for the acts of the executor until the final account of the executor is allowed in the Probate Court. These cases do not decide that a change in capacity from that of executor to trustee cannot result where, as here, executors and trustees, duly appointed by the Probate Court under a will that exempts "them each as executors and as trustees from giving surety or sureties upon their official bond" have claimed a credit on their executorship account filed in the probate office for a sum held by them as trustees, and have also filed in that office an inventory or account charging themselves with the like amount as trustees. *Newcomb v. Williams*, 9 Met. 525, decides that a change in capacity may result when the executor is not required to give a bond, and has shown by any authoritative and notorious act that he has elected to act in the capacity of trustee. See *White v. Ditson*, 140 Mass. 351, 354; *Batchelder v. Cambridge*, 176 Mass. 384; *Henry v. United States*, 251 U. S. 393; *Rhines v. Wentworth*, 209 Mass. 585, 588; *Williams v. Acton*, 219 Mass. 520.

While the probate of the will was in litigation, the estate increased in value to a sum largely in excess of \$750,000. The sole duty of the trustees, under the fifth clause of the will, was to invest and reinvest the rest and residue of the estate until the accumulated fund should amount to the net sum of \$750,000, and to pay over the net accumulated fund to the Institute of Technology at the expiration of twenty-one years from the decease of the testator, or sooner, should the accumulated net fund amount to \$750,000; otherwise the fund was to revert to the estate of the testator. When the will was finally probated and the trustees appointed under the fifth clause, the value of the rest and residue of the estate exceeded \$750,000. The trustees were consequently discharged of the duty of investment and reinvestment, and of sale for the purpose of investing the trust estate until the principal with the income should form a fund to the amount of \$750,000, and were required only "to pay over said entire net accumulated fund to the Massachusetts Institute of Technology" when the principal and income should be paid to them by the executors, if the entire rest and residue of the estate then equalled \$750,000.

The testator declares that the fund is given to the Massachusetts Institute of Technology "for the purpose of founding or endowing in said Institute a department of naval architecture and marine engineering, the said department to be forever called 'Pratt School of Naval Architecture and Marine Engineering.'" The testator then declares how his purpose to found the department in the Institute shall be worked out, by the provision that the fund shall be held upon the express trust and condition that "upon the payment of the said fund by my said Trustees to it, the said Massachusetts Institute of Technology shall forthwith erect upon its lands a substantial building of a kind and appearance and according to plans and specifications to be first approved by my said Trustees, and for that purpose is to be used such portion of said fund as may be necessary; the remainder of said fund is to be held by said corporation in trust forever, and the income therefrom is to be applied and used for the support and maintenance of said 'Pratt School,' and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance."

The defendants contend that the provision, that the Institute "shall forthwith erect upon its lands a substantial building of a kind and appearance and according to plans and specifications to be first approved by my said trustees," constitutes a condition which must be performed before that part of the fund which shall be unexpended at the completion of the building vests in the Institute as a trust fund for the support and maintenance of the Pratt School. We think the Institute of Technology took the entire fund under a charitable trust for the purpose of founding and endowing the Pratt School; that the trust estate vested in it with the receipt of the fund, and did not depend for its existence upon the erection of the building within which the school or department was to be maintained. We also are of opinion that the direction or condition, that the building should be erected forthwith by the petitioner after the receipt of the residue or accumulated fund, is a requirement that it should be erected within a reasonable time, having regard to the circumstances and in particular to the declared purpose of the testator to found and endow a school or department with a home in a building which the tes-

tator directed to be erected for that use and purpose. The circumstances of the case indicate plainly enough that during the war, regardless of the prohibition of the war board, the erection of a building such as the then state of development of naval architecture and marine engineering demanded would have required an expenditure of money entirely disproportionate to the fund, and would have left an income inadequate to maintain the building or the school.

The defendants further contend that the testator's plan is void for remoteness and "violates the rule against perpetuities," in that there is a life estate outstanding which is a charge on the whole estate; because under the provision of the will the fund might not be paid over until twenty-one years after the death of the testator; because the fund for the maintenance of the school cannot be formed or vest until the erection of the building; and because the direction as to the erection of a suitable bronze tablet in some appropriate place in the interior of the building does not have to do with the construction of the building, is to be set up indefinitely as to time after the building is erected, is not for any charitable purpose but is a "pure memorial" which will require the expenditure of an indefinite sum of money which cannot be separated from the rest of the fund.

The trust fund with its accumulation of income, created by the fifth clause of the will, is a trust for charitable purposes; the beneficiaries who are entitled to the equitable interest are young men of all classes in life who may seek instruction in "naval architecture and marine insurance;" the legal title and the equitable title came into existence at once on the death of the testator, subject to the administration of the estate and the accumulation of principal and income to the net amount of \$750,000 within twenty-one years. The entire residue of the estate, that is, all the estate except so much as was needed to be set apart to insure the payment of the life interest and the annuities, formed a trust for charitable uses, subject to be divested if the principal and accumulated income did not amount to \$750,000 on or before the expiration of twenty-one years. The fund which was formed was not limited upon a life estate, but was all the rest and residue of property owned by the testator, some of which was subject to the life interests of individuals. This is not therefore the case of a

gift to an individual to be followed by a remote gift to a charity, but is an immediate gift of a legal interest to be held on a charitable trust. *Odell v. Odell*, 10 Allen, 1, 7. *Codman v. Brigham*, 187 Mass. 309, 313. The direction to erect a memorial of bronze in the interior of the building is a mere incident in the construction of the building; and the testator's motive to commemorate himself and family does not prevent the main purpose from being charitable. *Richardson v. Essex Institute*, 208 Mass. 311. *Jones v. Habersham*, 107 U. S. 174, 189.

The defendants next contend that the testator made an impracticable provision in defining the purposes of his gift to establish or endow a department of naval architecture and marine engineering, because in the only place which says anything about instruction in the school the will reads: "and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance." Consideration of the declared purpose of the testator and the repeated use in the will of the phrase "Naval Architecture and Marine Engineering" make it very plain that the word "insurance" was inadvertently used and is an obvious misdescription of the word "engineering." It follows that the word "insurance" should be struck out. *Patch v. White*, 117 U. S. 210, 217. *Morrell v. Morrell*, 7 P. D. 68. *In the Goods of Boehm*, [1891] P. 247. *In the Goods of Schott*, [1901] P. 190. *Polsey v. Newton*, 199 Mass. 450.

The defendants finally contend that the heirs and next of kin are entitled to any surplus above \$750,000 when that amount was paid over to the plaintiff. As has been said, the rest and residue vested as a charitable trust with the death of the testator. *Williston Seminary v. County Commissioners*, 147 Mass. 427. The plaintiff was then entitled under the fifth clause of the will to receive the fund when it reached the limit of \$750,000 should it amount to as much within twenty-one years. The right was not affected by the litigation which prevented the trustees from being appointed or from paying over the net accumulated fund to the plaintiff. The manifest intent of the testator was to give the entire rest and residue of his estate to the charitable purpose defined in the fifth clause of the will, subject only to the limitation that it should not be paid until it and the accumulated in-

come reached the limit set within twenty-one years after his decease.

The rights of the parties stand as if the legacy had been paid over when the right to it accrued. "The increase of the fund therefore, whether by the addition of income from its investments, or by their appreciation in value, must result to the benefit of the party entitled to the fund itself." *Baker v. Clarke Institution for Deaf Mutes*, 110 Mass. 88, 90. *Fire Insurance Patrol v. Boyd*, 120 Penn. St. 624, 646.

A decree, in terms to be settled by a single justice, is to be entered, authorizing the plaintiff to sell and convey the real estate described in the bill.

Decree accordingly.

OLD COLONY TRUST COMPANY, trustee, *vs.* LYDIA SARGENT
& others.

Suffolk. January 16, 1920. — March 24, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Devise and Legacy. Power.

A testator by his will and a codicil provided that the share of one of his sons in the residue of his estate should go to a trustee, the income thereof to be applied equally to the support of the son's wife and her children by him, and that in the event of the death of either the wife or a child, the income was to be divided equally among the survivors, and that, should a child of the son marry, he or she was to have "the right to dispose of his or her interest by will on his or her decease." At the death of the testator, the son's wife and two children, a grandson and a granddaughter of the testator, were living. The grandson married and died, leaving a will naming his wife executrix and devising and bequeathing to her all his property, including any over which he had the power of testamentary disposition. Upon a bill for instructions as to the proper disposition of such part of one third of the income from the trust fund which had accrued and had not been paid to the grandson at the date of his death, and of the income accruing thereafter, and also as to disposition of the principal, it was held, that

(1) The widow of the deceased grandson was entitled as executrix to receive one third part of the income which had accrued between the date of the last payment of income to her husband and his death;

(2) The widow was not entitled as executrix or otherwise to receive any part of the income from the trust fund accruing after her husband's death;

(3) The entire income accruing after the death of the grandson should be paid to his mother and his sister equally, and, upon the death of either of them, to the survivor of them wholly;

(4) The widow of the grandson was entitled to one half the principal of the trust fund upon the death of her husband's mother and sister.

The other residuary legatees under the will and codicil creating the trust were not entitled to receive any part of the principal of the fund.

In the suit above described, it was necessary, in order properly to determine the rights and interests of the life beneficiaries, to make some determination, before the termination of the life estates, of what disposition should be made of the fund upon that event; but it was *said* that this departure from the well settled rule that such determination before the event is premature should not be regarded as a precedent.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 27, 1919, by the trustee under the will of Joseph Sargent, late of Worcester, for instructions. The instructions requested, with material quotations from the will and codicil, appear in the opinion.

The suit came on to be heard before *Carroll*, J., and was reserved by him for determination by the full court upon the pleadings and an agreed statement of facts.

The case was submitted on briefs.

T. H. Gage, for the defendant Lydia Sargent.

C. E. Allen, for the defendant Mildred P. Sargent.

E. Brown, for the defendant Mary S. Brown.

PIERCE, J. Joseph Sargent of Worcester, Massachusetts, died on October 13, 1888, testate. His will, executed on July 16, 1879, and a codicil thereto, executed on March 28, 1887, were proved and allowed on November 8, 1888. By his will he gave to his son Henry \$10,000, and to his wife, to his three other children, and to a grandchild pecuniary or specific legacies. He divided the rest and residue of his estate, however described, among his four children equally. He appointed his sons Joseph, Jr., and Henry executors without bonds, and suggested "that it would be wise to keep the productive real estate together, under said executors as trustees, dividing its income among my several heirs, so that each should get such portion as his or her interest would demand." By the codicil he directed that it should have the same force as the will under the direction of the same executors, whom he also constituted trustees, "so long as any portion of my estate may remain undivided, neither of them being required to furnish

any bonds, for the faithful execution of his Trust." He revoked the special bequest of \$10,000 made to his son Henry Sargent, and directed his executors to pay over the \$10,000 to Joseph Sargent, Jr., as trustee, for Lydia Sargent, wife of his son Henry Sargent, the trustee not to be required to furnish bonds. He directed the trustee, and his successor, if any, "to pay over the income of said Ten Thousand Dollars, or its representative, in the valuation of my estate, to the said Lydia Sargent, in semi-annual payments, and at her decease, to divide the said sum of Ten Thousand Dollars, or its representative, with any increment thereof, equally among the children of the said Lydia, by my son Henry. And if there are no such children, at her decease, this portion of my property, shall revert to my other children equally, or to their representatives." He stated that he used the word "increment" because the property was mostly real estate and might "ultimately, have a value much greater than its appraisal, soon after . . . [his death], might indicate." He also provided that the said annual payments to Lydia should continue in case of the death of his son Henry, her survivorship and subsequent marriage.

The codicil then continued as follows: "Further, I direct my said executors and trustees, to put aside one third of the one fourth remaining portion of my estate, which under my will of July 16th 1879, would become the property of my son, Henry Sargent, and to place it with my son, Joseph Sargent Jr. trustee as before, and without bonds, who shall apply its income, in semi-annual payments, equally to the support of Lydia Sargent, wife of my son Henry, and to her children by him, the income, in the case of the death of either mother or child, to be divided equally among the survivors. And in case of the marriage of any child of the said Henry and Lydia, the said child's portion of the said income shall be continued to the said child, without any hindrance from any person whatever, the child, however, to have the right to dispose of his or her interest by will on his or her decease."

The testator drew in his own handwriting the will and codicil.

At the dates of the execution of the will and codicil the testator was aware of an estrangement between his son Henry Sargent and the son's wife Lydia Sargent, although there was no divorce until after the testator's death. At the date of the execution of

the codicil to the will of the testator, March 28, 1887, and at his death, two children of his son Henry and the said Lydia Sargent were alive to the knowledge of the testator, namely, Henry Sargent, Jr., and Mary Sargent Brown; and no further children were born to the testator's son Henry and his wife, Lydia Sargent.

Henry Sargent, Jr., died on December 21, 1918, testate, without issue. His will was duly proved and allowed. In the first paragraph thereof he gave, bequeathed and devised all of his property and estate real, personal and mixed, wherever situated, to which he should be in any way entitled at the time of his decease and over which at the time of making his will or thereafter, he should have any power of testamentary disposition or appointment, to his wife and her heirs forever. This was a due execution of the power of disposing by will of the interest of Henry Sargent, given to him under the codicil. *Hassam v. Hazen*, 156 Mass. 93. *Howland v. Parker*, 200 Mass. 204. *Russell v. Joys*, 227 Mass. 263, 267.

The original trustees resigned or died and the plaintiff was duly appointed trustee to fill the vacancies. It has continued to act under said appointment down to the present time, and now prays that this court will construe the last paragraph of the codicil and instruct it on the following points:

"First. Is Mildred P. Sargent, executrix of the will of Henry Sargent, Jr., entitled to receive one third or any part of the income which accrued between August 6, 1918, the date of the last semi-annual payment of income to Henry Sargent, and December 21, 1918, the date of the death of said Henry Sargent? If not, to whom should such part of the income be paid?

"Second. Is Mildred P. Sargent entitled to receive one third or any part of the income from the trust fund accruing after the death of Henry Sargent, Jr., by virtue of the provisions of his will or otherwise; and, if so, to what part and for what period will she be entitled to receive the same? If she is not entitled to any of the income accruing since the death of said Henry Sargent, Jr., to whom should the same be paid?

"Third. Is Mildred P. Sargent by virtue of the provisions of the will of Henry Sargent, Jr., or otherwise, entitled to receive any part of the principal of the trust fund; and, if so, to what part is she entitled and at what time is distribution of the same to her to be made?

"Fourth. Are the residuary legatees under the will of Joseph Sargent, the testator, entitled to any part of the principal of said fund; and, if so, to what part and at what time is distribution of the same to be made to them?"

As executrix of the estate of Henry Sargent, Jr., Mildred P. Sargent is entitled to receive one third part of the income which accrued between August 6, 1918, and December 21, 1918, the date of the death of Henry Sargent, Jr. R. L. c. 141, § 25.

Mildred P. Sargent is not entitled as executrix or otherwise under the will of her husband to receive one third or any part of the income from the trust fund accruing after the death of Henry Sargent, Jr. — the codicil in explicit terms providing that the income which the trustee is required and directed to apply "in semi-annual payments, equally to the support of Lydia Sargent . . . and to her children" shall be divided equally among the survivors in case of the death of either mother or child. Regardless of the order of their deaths, the intent of the testator is plain that the survivor or survivors shall receive through the trustee the entire income of the trust so long as they or any one of them shall live to receive support. It is manifest that the testator did not intend that the support of the children of Lydia should fail upon the death of Lydia; and it is equally plain that he did intend that the entire income should be received as support by the survivor or survivors until the death of the last survivor, be that survivor the mother or a child, — equally if two or more, and entirely if one. The power given any child of Lydia and Henry in case of the marriage of that child to dispose of his or her interest by will on his or her decease, does not confer any right to dispose of the income applied to the support of that child during its lifetime, because that support necessarily ceased with the death of the beneficiary, because the power is to dispose of "interest" and not income, and because to do so would be inconsistent with and repugnant to the provision that the income of the fund shall be divided equally among the survivors in case of the death of either mother or child.

It is contended that the power to dispose of his or her interest cannot apply to an interest in the principal fund out of which the income arises, because in analogy to the limitation of the trust in the preceding paragraph of the codicil the duration of the trust in

question is limited to the life of Lydia Sargent. The analogy fails for the reason that the testator in the preceding paragraph gives the entire use and benefit of the income of \$10,000 as the increment of the unsold real estate, which in appraisal the \$10,000 represents, to Lydia for life, with the principal sum or its representative not income to be divided "among the children of the said Lydia, by my son Henry," if there are such children at her death; whereas in the paragraph in question the trust for support is to continue during the several lives of the children who shall survive Lydia. To a majority of the court it would seem to be the intent of the testator, and we so construe his codicil, to empower any child in case of his or her marriage to dispose of the trust fund as the "interest" of that child might be at his or her death, subject to the undisturbed enjoyment of the entire income during the lifetime of the surviving beneficiary or beneficiaries under the trust. The result of this construction is that the widow of Henry, Jr., takes in her own right one half of the principal fund subject to the life interest of the surviving mother and sister; the surviving sister has a power to dispose by her will of the remaining half of the trust fund subject to any outstanding life interest in the income; and the residuary legatees under the will of Joseph Sargent are not entitled to receive any part of the principal of said fund.

The determination of the rights and several interests in the life estate has required a departure from the well settled rule that a direction as to the final disposition of the trust property will not be given while equitable life estate continues, and is not to be taken as a precedent for such action. *Minot v. Taylor*, 129 Mass. 160. *Bullard v. Chandler*, 149 Mass. 532.

The trustee accordingly is instructed:

1. That Mildred P. Sargent, executrix, is entitled to receive the income that accrued between August 6, 1918, and December 21, 1918.

2. Mildred P. Sargent is not entitled to receive one third or any part of the income accruing after the death of Henry Sargent, Jr., by virtue of the provisions of his will or otherwise; the income so accruing is to be paid to Lydia Sargent and to Mary S. Brown, equally, and to the survivor of them, wholly.

3. Mildred P. Sargent, by virtue of the provisions of the will

of Henry Sargent, Jr., is entitled to receive one half of the principal of the trust fund on the death of the survivor of Lydia Sargent and Mary S. Brown.

4. The residuary legatees under the will of Joseph Sargent are not entitled to any part of the principal of said fund.

Decree accordingly.

JOHN MARSCH vs. SOUTHERN NEW ENGLAND RAILROAD
CORPORATION.

Suffolk. October 23, 1919. — March 25, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & CARROLL, JJ.

Practice, Civil, Discontinuance, Motion to vacate judgment. Judgment. Words, "Trial."

The plaintiff, in an action of contract in which no declaration in set-off has been filed and which has not been referred to an auditor, has a right to discontinue his action at any time before trial.

It seems that, since the enactment of St. 1914, c. 576, § 1, the opening of an action for a trial upon the merits before an auditor, or before a judge where no jury has been claimed, or before a jury fixes the time after which the plaintiff cannot discontinue his action as a matter of right.

An amended declaration in an action of contract contained two counts, the first being upon a contract in writing and the second upon an account annexed for labor and materials performed and furnished under the contract in writing. The defendant filed a general answer to the second count and a motion to strike out certain portions of the first count. The motion having been allowed and the case reported to this court under R. L. c. 173, § 105, this court, treating the motion as a special demurrer to the first count, allowed it. Thereafter, without notice to the defendant and without leave of court, the plaintiff discontinued his action. *Held*, that he had a right so to discontinue at that time.

After the discontinuance in the circumstances above described, judgment was entered for the defendant for costs. The defendant, alleging that the plaintiff had brought an action for the same cause in a federal court, moved under R. L. c. 193, § 14, that the judgment be vacated. The motion was denied, and the defendant appealed. *Held*, that the order denying the motion must be affirmed.

CONTRACT, with a declaration in two counts, the first count being upon a contract in writing for the construction of a railroad from Palmer to a point in Blackstone adjoining the State line of Rhode Island, and the second count being upon an account an-

nexed containing two hundred and forty-nine items (the first item having two hundred and twenty-four subdivisions) for \$1,319,-327.88 for labor and materials performed and furnished. Writ dated November 25, 1916.

The defendant demurred to the first count of the declaration and filed an answer to the count upon the account annexed.

The plaintiff then filed a motion asking leave to strike out the first count and to substitute therefor an amended first count; and his motion was granted, leave being reserved to the defendant to demur or plead within twenty days.

Thereafter the defendant moved to strike out parts of the amended first count. This motion was denied, together with similar motions in actions against other railroad corporations upon the same contract, and, the ruling being reported to this court for determination, the decision was rendered which is reported in 230 Mass. 483.

After rescript, the plaintiff filed a discontinuance and on the following Monday judgment was entered for the defendant for \$270.06, costs of suit. Seventeen days thereafter, the defendant moved to vacate the judgment and to strike out the plaintiff's discontinuance. The motion was denied by *Chase, J.*, and the defendant appealed.

F. P. Garland, (A. Leonard with him,) for the defendant.

L. Withington, for the plaintiff.

BRALEY, J. "A final judgment may be set aside on an appeal seasonably taken for the correction of errors of law apparent on the face of the record, or by a petition to vacate a judgment, or by a writ of review . . . or by a writ of error, if there are grounds for any of these proceedings." R. L. c. 193, §§ 1-9, 15-18, 21-37. *Davis v. National Life Ins. Co.* 187 Mass. 468, 469. But under R. L. c. 193, § 14, a judgment also may be vacated upon motion in writing of the prevailing party, filed in the case within three months thereafter if the execution has not been satisfied in whole or in part. It is under this section that the defendant seasonably moved to vacate the judgment in its favor on which an execution could issue only for costs. The motion is analogous to a petition for review, the granting of which depends very largely upon the discretion of the court. *Boston v. Robbins*, 116 Mass. 313, 314. *Hastings v. Parker*, 168 Mass. 445. *Hunt v. Simester*, 223 Mass.

489. The defendant having asked for no specific rulings and having appealed only from the denial of the motion, the question is, whether as matter of law the order was erroneous.

It was decided when this case was first before us, *Marsch v. Southern New England Railroad*, 230 Mass. 483, that each of the seven specifications of the defendant's motion to strike out certain portions of the first count of the declaration which rested on the contract, a copy of which was annexed, should be considered as special demurrers, and the rescript directed that the motion to strike out should be allowed and the demurrers severally sustained. But no order was made that judgment for the defendant should be entered, nor did the defendant ever move for judgment. The declaration contained a second count on an account annexed to which the defendant filed a general answer, and it was held that this count was sufficient as matter of pleading to enable the plaintiff to recover for work and labor performed under the contract, but not to exceed the contract price. The plaintiff, however, after rescript filed a general discontinuance, and judgment thereon for the defendant was subsequently entered. The defendant alleges that, the plaintiff having brought a second action of contract in the "District Court of the United States, District of Massachusetts, . . . alleging substantially identical breaches of the same contract . . . it is of the utmost importance . . . that it appear from the docket of this court . . . [that] the issues raised . . . and decided by said opinion and rescript, be terminated thereby, and not by a later discontinuance, in order that the defendant may not be hectorred and harassed by further litigation of matters already finally determined in its favor." And "that said . . . judgment . . . upon said general discontinuance be vacated by the court in the exercise of its discretion because entered without notice to the defendant" or of the "discontinuance of which the defendant had no notice prior to said entry of judgment," and that "said . . . general discontinuance be stricken from the files of the court," because the discontinuance and judgment were "without authority in law."

While the only finding of fact of the judge is that the allegation that a second action had been brought is true, we assume from the record that the defendant had no notice of the discontinuance until after the entry of judgment.

A plaintiff "cannot discontinue in equity after a decree or other proceeding whereby the defendant's situation has been materially changed, so that he has acquired rights which did not exist or which had not been determined when the suit was brought, and which render it equitable that these rights should be fully secured by further proceedings in the case." *Worcester v. Lakeside Manuf. Co.* 174 Mass. 299, 301. *Kyle v. Reynolds*, 211 Mass. 110. *Lumiansky v. Tessier*, 213 Mass. 182, 190. *Keown v. Keown*, 231 Mass. 404.

It was settled under our practice previous to the enactment of St. 1914, c. 576, § 1, which is not applicable to the facts of the present case, that where no declaration in set-off has been filed under R. L. c. 174, § 8, a plaintiff has the right at law voluntarily to become nonsuit at any time before trial, but after the trial has begun he cannot become nonsuit except by permission, and at the discretion of the court. *Derick v. Taylor*, 171 Mass. 444, 445, *Carpenter & Sons Co. v. New York, New Haven, & Hartford Railroad*, 184 Mass. 98, *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 475, and cases there collected. And "trial" means "The examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." *Commonwealth v. Soderquest*, 183 Mass. 199, 201. The opening of the case to the jury or to the court, if a jury has not been called for, fixes the time after which a plaintiff cannot discontinue as matter of right. It also is wholly immaterial whether the opening is followed by a full or partial trial. *Locke v. Wood*, 16 Mass. 317. *Means v. Welles*, 12 Met. 356, 361. *Lowell v. Merrimack Manuf. Co.* 11 Gray, 382. *Shaw v. Boland*, 15 Gray, 571, 572. *Truro v. Atkins*, 122 Mass. 418. *Burbank v. Woodward*, 124 Mass. 358. *McQuesten v. Commonwealth*, 198 Mass. 172, 175. The fact that the defendant may be subject to further litigation does not affect the rule.

If a judgment for the defendant is entered on a general demurrer, which is not rendered on the merits, it is no bar to a subsequent suit for the same cause of action between the parties. *Wilbur v. Gilmore*, 21 Pick. 250, 253. *Capaccio v. Merrill*, 222 Mass. 308. The first count of the declaration in this action, even after the emendations, contained general and positive allegations that the plaintiff had fully performed the contract, and that the

defendant had refused performance. If issue had been joined by an answer containing a general denial, the defendant could have objected at the trial that the declaration was not supported by the evidence. *Hubbard v. Mosely*, 11 Gray, 170. *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502. But the objection, that if all the remaining allegations were proved no valid cause of action had been stated, could be raised only by a general demurrer. *Batchelder v. Batchelder*, 2 Allen, 105. *Thomson v. O'Sullivan*, 6 Allen, 303, 304. *Shawmut Mutual Fire Ins. Co. v. Stevens*, 9 Allen, 332, 334. *Carnig v. Carr*, 167 Mass. 544, 548. The motion to strike out, moreover, when treated as a special demurrer, applied only to parts of one form of statement of the plaintiff's case. If the plaintiff finally prevailed the judgment would have been a general judgment, notwithstanding the record as to the first count. *West v. Platt*, 127 Mass. 367. *Brown v. Woodbury*, 183 Mass. 279. The record showed unsettled questions on which issue had been joined, and there could be only one final judgment. *Leonard v. Robbins*, 13 Allen, 217. See *Merchants' Ins. Co. of Providence v. Abbott*, 131 Mass. 397, 407; R. L. c. 177, §§ 6, 7. The plaintiff at the date of the nonsuit was under no legal requirement to amend the first count, and the defendant, who had demurred only to certain allegations whereby the plaintiff sought to anticipate the defence of his alleged non-compliance with certain provisions of the contract requiring the certificate of the engineer, was not entitled to judgment, unless the merits of the entire controversy, which still remained for trial, were determined in its favor. R. L. c. 173, §§ 13, 14, 17. *Hobson v. Satterlee*, 163 Mass. 402. *Cummings v. Ayer*, 188 Mass. 292. *Capaccio v. Merrill*, 222 Mass. 308.

We are of opinion, for the reasons stated, that no reversible error has been shown.

Order denying motion affirmed.

PETER BOLDEN'S CASE.

Hampden. November 10, 1919. — March 29, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL,
& JENNEY, JJ.*Workmen's Compensation Act, To what injuries act applies, Procedure.*

A subscriber under the workmen's compensation act furnished for the use of his workmen a fountain commonly known as a "bubble fountain." An employee, who had been made ill by the coldness of the water in the fountain, sought, without the knowledge of his employer, to fill an empty bottle, which was his property, from the fountain, intending to let the water stand in the bottle to lessen its chill. "The water did not go in very well so he pressed hard on it and very suddenly the bottle burst" and he was injured. In a proceeding under the workmen's compensation act, it was *held*, that the injury received by the employee did not arise out of and in the course of his employment.

In the proceeding under the workmen's compensation act above described, the Industrial Accident Board's entire decision was, "revising the findings and decision of" a single board member, that they did "find and decide" that the employee's injury did not arise out of and in the course of his employment. On appeal to the Superior Court, a decree was entered "upon all the evidence that" the employee's injury did not so arise. This court, on appeal, *held* that, if the action of the Industrial Accident Board be regarded as a finding of fact, it was final, being supported by the evidence; and that, if it be treated as a ruling of law, it was right.

APPEAL to the Superior Court under the workmen's compensation act from a decision of the Industrial Accident Board as follows: "The Industrial Accident Board, revising the findings and decision of the board member [which awarded compensation to the employee], find and decide that the personal injury received by the employee . . . did not arise out of and in the course of his employment."

The appeal was heard by *King, J.* Material facts are described in the opinion. By order of the judge a decree was entered "upon all the evidence that the personal injury received by the employee on October 26, 1917, did not arise out of and in the course of his employment." The employee appealed.

The case was submitted on briefs at the sitting of the court in November, 1919, and afterwards was submitted on briefs to all the Justices.

A. R. Simpson, for the employee.

H. A. Moran, for the insurer.

RUGG, C. J. Bolden was employed by a subscriber under the workmen's compensation act. The subscriber provided for the use of its employees that which is termed in each brief a "bubble fountain." There was no drinking glass at the fountain. "It is the kind that one squeezes and the water comes out." It is apparent that it was designed to be used by drinking from it directly. Bolden testified that he had been made ill on an earlier occasion by drinking cold water from the fountain. There was also a faucet at a sink where he had at times drunk water. It did not appear that this was intended for drinking water and he had ceased because informed that it was river water and unfit for drinking. Therefore he endeavored to fill an empty bottle from the fountain, intending to let it stand and thereby to lessen the chill of the water. "The water did not go in very well so he pressed hard on it and very suddenly the bottle burst." As a result he received injuries for which compensation is sought.

The Industrial Accident Board decided that the injury did not arise out of the employment but was occasioned by the employee's use of the bottle in trying to draw water from the fountain, that the risk of such an injury was not incidental to his employment but on the contrary "was due to an added peril, imported into the employment by the claimant, and having no connection with his contract of employment."

If this be regarded as a finding of fact, it is final. Manifestly it is supported by evidence. Nothing is better settled under the workmen's compensation act than that such a finding must stand and cannot be reviewed on appeal. *Sponatski's Case*, 220 Mass. 526, 530. *Pass's Case*, 232 Mass. 515, and cases there collected.

If the decision of the Industrial Accident Board be treated as a ruling of law, it was right in the opinion of a majority of the court. In order that compensation may be awarded under the workmen's compensation act, it must appear that there is "a causal connection between the conditions under which the work is required to be performed and the resulting injury." *McNicol's Case*, 215 Mass. 497, 499. The injury must be seen "to have had its origin in a hazard connected with the employment and

to have flowed from that source as a rational consequence." *Reithel's Case*, 222 Mass. 163, 165. "The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment and not by some other agency, or there can be no recovery." *Madden's Case*, 222 Mass. 487, 495.

It is provided by St. 1915, c. 117, that "All industrial establishments within this Commonwealth shall provide fresh and pure drinking water to which their employees shall have access during working hours." It is manifest that the fountain was provided by the subscriber pursuant to the duty imposed by the statute. Apparently its design was to avoid the danger to health thought, in accordance with the present general view, to be incident to the common drinking cup. See Sts. 1910, c. 428; 1911, c. 491. At all events this means adopted by the subscriber for providing drinking water for its employees could not be pronounced unreasonable. The fountain being a proper instrumentality and having a plain and unmistakable method for use, there was clear notice to employees as to the way in which they should avail themselves of it.

The drinking of water, as necessity required, was within the scope of the employment. The use of the bottle by the employee with reference to the fountain in the manner shown was no part of the subscriber's business. The subscriber fulfilled his statutory duty by furnishing a well recognized sanitary method of affording drinking water to its employees. The bottle belonged to the employee and its use was not sanctioned or even known by the subscriber. The employee was acting outside the scope of his employment when he interjected that foreign instrumentality into his method of use of the fountain. His injury was not due to the fountain or the water, but to the bottle, a thing which had no connection whatever with the subscriber or the course of the employment. The appliance provided by the subscriber was diverted from its natural function to a purpose not disclosed to nor approved by the subscriber, and for which it was not designed. The employee used it in a way not contemplated by the subscriber and in a manner for which it was not intended. The conduct of the employee was quite outside the course of his employment.

The case at bar, so far as concerns authority, is fully covered

by *Borin's Case*, 227 Mass. 452. See *Rockford's Case*, 234 Mass. 93. It is distinguishable from *Osterbrink's Case*, 229 Mass. 407, where the conduct of the employee was in no sense a misuse or perversion of instrumentalities provided by the subscriber and was found to have had in effect the approval of the subscriber. The principle illustrated by *Nickerson's Case*, 218 Mass. 158, has no relation to the facts here disclosed.

Decree affirmed.

LIONEL E. SAMUELS vs. W. H. MINER CHOCOLATE COMPANY.

Hampden. February 24, 1920. — March 29, 1920.

Present: RUGG, C. J., DE COURCY, CROSBY, PIERCE, & CARROLL, JJ.

Practice, Civil, Finding by judge, Auditor's report. *Contract, Construction, Performance and breach.*

From the report of an auditor, to whom was referred an action of contract for an alleged breach by the defendant of an agreement to sell and deliver to the plaintiff two thousand barrels of cocoa powder by lot shipments, it appeared that, following conversations between the parties which were not in evidence, the defendant wrote to the plaintiff "confirming" the conversations "as per contract enclose," and that the "contract," although it contained a provision that the seller had "the privilege of billing and shipping all goods not withdrawn at the expiration of this contract," contained no promise as to the amounts or number of the lot shipments. The report contained sentence extracts from several letters between the parties bearing upon that subject and then the following statement: "From the remainder of the above correspondence and the confirmation and such inferences of fact as may be drawn therefrom I find . . .," which was followed by a finding that the lot shipments were to be "in such amounts, not to exceed one hundred (100) barrels per week, as the plaintiff should direct." The plaintiff so directed shipments that, when the contract had eleven weeks only to run, there were more than fourteen hundred barrels uncalled for by the plaintiff. The defendant then cancelled the contract. It also appeared that the plaintiff failed to send a check for each lot ordered by him before shipment was made, which, the auditor found, was a requirement of the agreement. A judge of the Superior Court, who heard the case upon the auditor's report as the only evidence, found for the defendant. *Held*, that

(1) The judge was warranted in finding that the contract between the parties was not wholly embodied in the letter of confirmation of the plaintiff's order;

(2) The judge was warranted in finding that the plaintiff had broken the contract, that the breach went to its essence, that the cancellation by the defendant was warranted; and in finding for the defendant.

CONTRACT for breach of an agreement of the defendant to sell and of the plaintiff to buy two thousand barrels of cocoa powder. Writ dated November 16, 1919.

The action was referred to an auditor. The material portion of the defendant's letter of April 17, 1917, referred to in the opinion, was as follows: "Confirming conversations over the 'phone last night and this afternoon, we have booked you with two thousand (2000) barrels of Cocoa, as per contract enclose, to be drawn for during the year 1917 at $11\frac{1}{2}$ c. per lb."

The auditor found, "The conversations referred to in this letter were not introduced in evidence."

The "confirmation" referred to in the foregoing letter was signed by the defendant and contained the following, among other, provisions:

"Gentlemen:

"We take pleasure in confirming your order give Mr. Miner for the following goods:

Number of Packages	Containing	Description	Price
2,000 barrels	Cocoa		$11\frac{1}{2}$ c. per lb.

"Entire amount to be drawn during year 1917. First shipment starting May 15th, 1917. Check for each lot to be sent before shipment is made. 2% to be allowed on the above price on account of cash rec'd. . . .

"TERMS: 30 days NET, or CASH 10 days less 2 per cent. . . .

"The Seller has the privilege of BILLING and SHIPPING ALL GOODS not withdrawn at the expiration of this CONTRACT. . . ."

The report of the auditor continued as follows: "The above confirmation of the contract between the parties does not provide for the manner in which the cocoa was to be drawn by the plaintiff. It does provide, however, that a check should be sent for 'each lot' before shipment, and that the 'first shipment' should be made May 15, 1917. On July 23, 1917, the plaintiff wrote the defendant as follows: 'Up to the present time we are entitled to at least nine hundred barrels (900) according to our contract.' On July 27, 1917, the defendant wrote the plaintiff in reply to his letter of July 23, 1917, that 'According to our un-

derstanding we were to begin delivery May 15, fifty (50) barrels per week.' On September 27, 1917, the defendant wrote the plaintiff as follows: 'There is remaining about thirteen weeks to fulfill your contract of fifty (50) barrels a week. Under no circumstances will we accept an order for a larger quantity than one hundred (100) barrels a week.'

"As will be seen by the quotations from letters hereinafter referred to, the plaintiff, on several occasions, ordered one hundred barrels of cocoa but never more than that amount at any one time."

Then followed, in the auditor's report, the findings quoted in the first paragraph of the opinion.

Following other findings, described in the opinion, the auditor found and ruled as follows: "I find that the plaintiff waived any failure on the part of the defendant to deliver cocoa according to the terms of the contract prior to October 16, 1917, other than as involved in the purchases that were made by the defendant of cocoa from other manufacturers for the plaintiff, and the plaintiff had taken no steps to terminate the contract prior to October 16, 1917, when cancelled by the defendant.

"I rule that the failure of the plaintiff to order cocoa subsequent to August 15, 1917, and to take delivery and pay for the same in instalments between that date and October 16 was not a breach of his contract with the defendant in view of the terms of the contract and the circumstances of the case, as hereinabove recited, and that the plaintiff was, therefore, entitled to have delivered to him one hundred barrels per week for the remainder of the year 1917."

The auditor reported that, if "the rulings above stated are correct, and if, as matter of law, it should be held that the failure of the plaintiff to take deliveries did not constitute a breach so material as to justify the defendant in refusing to proceed with the performance of the contract," he found that the plaintiff was entitled to recover the sum of \$5,954; and that if, "on the other hand, the ruling is not correct, and as a matter of law, it should be held that the failure of the plaintiff to take deliveries constituted a breach so material as to justify the defendant in refusing to proceed further with the performance of the contract, then, I find that the plaintiff is not entitled to recover in this action."

The action was heard in the Superior Court by *Jenney, J.*, the auditor's report being the only evidence. The plaintiff asked the judge to make the following findings of fact: "From the contract and correspondence set out in the auditor's report, and such inferences of fact as may be drawn therefrom, the court finds that the contract between the plaintiff and the defendant was for the purchase and delivery of two thousand barrels of cocoa at eleven and one half cents per pound, the same to be drawn between May 15, 1917, and December, 1917, in such reasonable amounts as the plaintiff saw fit to order out."

The judge refused so to find, found for the defendant and reported the case to this court for determination.

The case was submitted on briefs.

C. S. Ballard, C. J. Weston & J. L. Young, for the plaintiff.

R. W. Ellis, E. H. Brewster & T. W. Ellis, for the defendant.

DE COURCY, J. The judge was warranted in finding that the contract between the parties was not wholly embodied in the defendant's letter of April 17, 1917, confirming the plaintiff's order. See *Davis v. Tremont Trust Co.* 234 Mass. 502. He had before him the report of the auditor in this respect, which was as follows: "From the remainder of the above correspondence and the confirmation and such inferences of fact as may be drawn therefrom I find that the contract between the plaintiff and the defendant was for the purchase and delivery of two thousand (2000) barrels of cocoa at eleven and one-half cents ($11\frac{1}{2}$ c.) per pound, to be shipped by the defendant at such times and in such amounts, not to exceed one hundred (100) barrels per week, as the plaintiff should direct. The plaintiff was not obliged to draw each and every week or at any particular time. On the other hand the defendant was not obliged to deliver in excess of one hundred (100) barrels per week. The whole two thousand (2000) barrels to be ordered shipped by the plaintiff during the year 1917, the first shipment to be made May 15, 1917. Payment for each shipment was to be made in advance and two per cent (2%) discount was to be allowed the plaintiff for cash."

There was some delay on the part of the defendant in shipping cocoa to the plaintiff during June and July, owing to its inability to obtain the additional presses which it ordered. The auditor has found, however, that the plaintiff "waived any failure on the

part of the defendant to deliver cocoa according to the terms of the contract prior to October 16, 1917." On September 4, 1917, the defendant wrote the plaintiff "we will ship you one hundred (100) barrels this week and from this on we will be able to ship you about one hundred (100) barrels a week." As matter of fact the defendant did ship one hundred barrels on September 5. The plaintiff before the arrival of this shipment wrote "as we had to go into the market last week and buy cocoa we would like to have you defer shipment as we are cramped for room." This statement was untrue; the plaintiff had not made such purchase. The last order actually sent by him was on August 15. On September 18 he wrote the defendant not to ship any more cocoa "until we advise you, as we are very cramped for room. We will let you know exactly when we need our next shipment." On September 27 the defendant wrote the plaintiff "this is to call your attention to your contract with us for cocoa powder. There is remaining about thirteen weeks to fulfil your contract. Under no circumstances will we accept an order for a larger quantity than one hundred (100) barrels a week, and we insist on this being placed with us now to complete your contract; otherwise we wish to cancel it." Finally on October 16 the defendant wrote the plaintiff "the discontinuance of orders for cocoa powder from you has necessitated our cancelling your contract for cocoa powder." To this letter the plaintiff did not reply.

The trial judge found for the defendant. That finding must stand if there was any substantial evidence to support it. The contract required the plaintiff to order the entire two thousand barrels between May 15 and December 31. When the contract was cancelled on October 16 there remained only about eleven weeks of the contract period. As only five hundred and fifteen barrels had then been ordered by the plaintiff, there remained fourteen hundred and eighty-five barrels; and the defendant was under no obligation to ship more than one hundred barrels per week. In addition to the failure of the plaintiff to send orders in compliance with his contract, there was a further neglect on his part to comply with the agreement, in his omission to forward a check for each lot before shipment was made. In the absence of any evidence to justify such conduct on the part of the plaintiff, we cannot say that the judge was not warranted in finding that he had

broken the contract on his part, that his breach went to the essence of the contract, and that it justified the defendant in cancelling the rest of the order. *Dudley v. Wye*, 230 Mass. 350. Accordingly judgment must be entered for the defendant.

So ordered.

ARTHUR HANNEMAN vs. I. SHLIVEK AND SONS, INCORPORATED.

Hampden. February 24, 1920. — March 29, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & JENNEY, JJ.

Contract, Of employment, Performance and breach. *Practice, Civil*, Ordering verdict. *Evidence*, Competency. *Damages*, For breach of contract.

At the trial of an action for breach of a contract in writing to employ the plaintiff as general manager of a store, the plaintiff agreeing to give "all his undivided time and attention exclusively to the said business," it appeared that the defendant had discharged the plaintiff during the term specified in the contract, and the defendant introduced evidence tending to show justification for the discharge in the fact that the plaintiff had disobeyed certain orders given to him by the defendant. Evidence of the plaintiff tended to show, as to some of the orders, that he had not received them, and, as to another, that his alleged act of disobedience preceded the giving of the order. A motion of the defendant for the ordering of a verdict in his favor was denied. *Held*, that the denial of the motion was right.

At the trial of the action above described, on the issue of damages, there was evidence of the defendant tending to show that, during the unexpired term of the contract, the plaintiff had been in the employ of a merchant and had received money from him. The plaintiff testified that this money was to reimburse him for certain outlays made for the merchant, and that, at the end of a certain period, he was to be paid by the merchant one third of his profits. The defendant excepted to a question asked of the plaintiff, "How did it happen you incurred expenses before beginning your connection with" the merchant's store? *Held*, that the question was competent, as the plaintiff had a right to show that the money paid to him by the merchant was not for services and, therefore, should not be considered in mitigation of damages.

The submission of special questions to a jury at the trial of an action of contract is wholly within the discretion of the trial judge.

CONTRACT upon an agreement in writing for the employment of the plaintiff as a general manager of the defendant's "retail ladies' outfit store" in Springfield, the agreement providing that the plaintiff should give "all his undivided time and attention

exclusively to the said business," and should receive as compensation \$50 per week and twenty per cent of the net profits earned in the store. Writ dated June 25, 1917.

In the Superior Court the action was tried before *Irwin, J.* The material evidence is described in the opinion. At the close of the evidence the defendant moved that a verdict be ordered in its favor. The motion was denied. The defendant then asked that certain special questions be submitted to the jury. The request was refused. The jury found for the plaintiff in the sum of \$1,458; and the defendant alleged exceptions.

The case was submitted on briefs.

C. E. Bell, M. Shlivek & S. Wandell, for the defendant.

G. H. Hughes & W. G. Brownson, for the plaintiff.

DE COURCY, J. The plaintiff was hired by the defendant as manager of its Springfield store for the period beginning April 3, 1916, and ending December 31, 1917; was discharged on June 23, 1917, and brought this action for breach of the written contract. The defendant's contention was that the discharge was justified by reason of the plaintiff's alleged violation of his duties under the contract. The jury returned a verdict in favor of the plaintiff for the full amount payable to the end of the contract period.

The principal exception taken by the defendant was to the refusal of the judge to order a verdict in its favor. There were three alleged violations of the contract by the plaintiff on which the defendant relied. The first was his failure to discharge one Mrs. Hubbard, a fitter employed at the store. The testimony of the defendant's president tended to show that he directed the plaintiff to discharge her immediately, because she had taken an afternoon off without permission. On the other hand the testimony of the plaintiff was that the order given him was to try to get another fitter and to get rid of her; that she was the only fitter in the store, and up to the time of his discharge he had been unable to secure another competent to do her work, although he endeavored to do so; and that she was not discharged even by the defendant until some time after he had left its employ. Here was an issue of fact for the jury as to whether the plaintiff disobeyed an order of the defendant. The second alleged violation of duty by the plaintiff was the sale by him of a suit on an order from the Peoples Credit Company. On this issue also the testi-

mony was in conflict. If that on behalf of the defendant were believed, the plaintiff was notified not to do any business with or through the Peoples Credit Company, because of the large discount claimed by it; and nevertheless he approved of a sale made on an order from that company. On the other hand if the jury believed the testimony of the plaintiff, the sale complained of had actually been made before the defendant directed him not to do business with or through the credit company. The third act of the plaintiff complained of was his leaving the store between five and six o'clock one Saturday afternoon in order to go to the barber shop. Here again was a conflict of testimony, the plaintiff testifying that he never had been told not to go out to get a shave during business hours. The law applicable to cases of this character has been stated by this court recently, and need not be repeated. *Farmer v. Golde Clothes Shop, Inc.* 225 Mass. 260. *Crabtree v. Bay State Felt Co.* 227 Mass. 68. *McIntosh v. Abbot*, 231 Mass. 180. See L. R. A. 1918, c. 1030 note. The judge's charge to the jury was not excepted to. Some of the rulings requested by the defendant and given by the judge were altogether too favorable to it. The question whether the discharge was justified was rightly submitted to the jury.

On the issue of damages, it appears that from September following his discharge until the end of the contract period the plaintiff was connected with the store of a furrier named Russek. From exhibits in evidence it appears that he received weekly from Russek the sum of \$35, together with the amount of expenses incurred at the store during the preceding week. The contention of the defendant was that this \$35 a week was received by the plaintiff as salary, and that it should be deducted from the amount that he might otherwise be entitled to recover in this action. The testimony of the plaintiff was that this \$35 a week was not received by him as salary, but as reimbursement for money which he had expended on account of Russek in trips to New York and Hartford for selecting stock, in paying to secure a location for Russek in Springfield, and for other expenditures. He also testified that at the end of the first season in March, 1917, he was to receive one third of the profits; but there was no evidence as to whether or not any profits were made. The exhibits indicate very strongly that the \$35 a week was ac-

tually received by the plaintiff as salary for his services. The only exception taken by the defendant in respect to this transaction was to the question "How did it happen you incurred expenses before beginning your connection with the Marcelle store?" Plainly this question was competent, as the plaintiff had a right to show, if he could, that the money received by him from Russek was not for services performed by him during the period covered by his contract with this defendant, and consequently that the defendant was not entitled to have the damages diminished thereby. The arguments now made on behalf of the defendant, that the verdict of the jury was contrary to the instructions given to them, and that it was excessive in amount, might well have been addressed to the trial judge in support of a motion to set aside the verdict; but they are not relevant to any exception that is before us.

The only other exception was to the failure of the judge to submit thirteen special questions to the jury. This was a matter within the discretion of the court. *Mercier v. Union Street Railway*, 234 Mass. 85.

Exceptions overruled.

COMMONWEALTH vs. ANTHONY HOUTENBRINK.

Suffolk. March 4, 1920. — March 29, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Optometry. Medicine. Physicians and Surgeons. Constitutional Law, Police power.

St. 1912, c. 700, regulating the practice of optometry, is a valid exercise of the police power and violates no provision either of the State or of the Federal Constitution.

One, who, without being authorized or registered as a practitioner of medicine under the provisions of R. L. c. 76, § 8, held himself out as a "Doctor of Ophthalmology," printing after those words, following his name on his billheads, the words, "(McCormick Medical College, Chicago)," and "Nervous Systems Measured and Analyzed. Glasses Fitted for Eye Defects," and who first examined eyes through an instrument called the ophthalmoscope, next placed a try-frame on the nose of the patient in which were inserted successively various lenses, and then fitted glasses for the patient, may be found to be holding himself out as a practitioner of medicine contrary to the provisions of the statute.

COMPLAINT, received and sworn to in the Municipal Court of the City of Boston on October 22, 1919, charging the defendant with practising optometry without being lawfully authorized to do so or registered with the board of registration in optometry; also a

COMPLAINT, received and sworn to in the same court on October 25, 1919, charging the defendant with holding himself out as a practitioner of medicine without being lawfully authorized to practise medicine or duly registered with the board of registration in medicine.

On appeal to the Superior Court, the complaints with the defendant's consent were tried together. The material evidence is described in the opinion.

At the close of the evidence, the defendant asked for the following rulings in the first case:

"1. That the acts complained of are not subject to legislative regulation, because the defendant did not operate on nor prescribe for any physical ailment or any physical injury or deformity of another.

"2. That the acts complained of do not constitute an offence, for the reason that St. 1912, c. 700, on which said complaint is based, is unconstitutional and contrary to arts. 6 and 7 of the Declaration of Rights and contrary to the Fourteenth Amendment to the Constitution of the United States."

The rulings were refused.

As to the second complaint, the defendant requested the following rulings:

"1. That on all the evidence, the defendant cannot be said to have held himself out as a practitioner of medicine.

"2. That although the defendant had a sign on the door of the room occupied by him as an office reading 'Doctor of Ophthalmology' from that he cannot be said to have held himself out as a practitioner of medicine."

These rulings also were refused. The jury found the defendant guilty on both counts; and the defendant alleged exceptions.

A. E. Reimer, for the defendant, submitted a brief.

H. P. Fielding, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. The defendant was convicted on two complaints, one charging the practice of optometry, the other of medicine,

without registration and certification as required by the statutes. Confessedly he was not registered nor certified so as to be authorized in accordance with the form of the statute to practise optometry or medicine.

There was evidence tending to show that the defendant held himself out as "Doctor of Ophthalmology," as examining the eyes of persons who resorted to him for that purpose, that he used an instrument called the ophthalmoscope, through which he looked at the eye, placed a try-frame on the nose of the patient in which were inserted successively various lenses, and then fitted glasses, and that he was skilled in the mechanical art of lens making. The defendant in his testimony explained the construction and purposes of an ophthalmoscope and his system of correcting vision by the use of lenses inserted in a try-frame adjusted to the patient's eyes and making up glasses from the lenses which the patient decided he could see through, and said that he had applied this method to about two hundred persons within two years of practice. On the defendant's billheads after his name were printed these among other words: "Doctor of Ophthalmology (McCormick Medical College, Chicago)," "Nervous Systems Measured and Analyzed. Glasses Fitted for Eye Defects." The defendant defined an ophthalmologist as one who had "a knowledge of physical optics, the physiology and anatomy of the eye." Other definitions were given in testimony as follows: "Ophthalmology is that science which deals with the treatment of conditions of the eye," including both optometrist and oculist. "An oculist and ophthalmologist are practically synonymous terms . . . the distinction between the optometrist and ophthalmologist or oculist is that the optometrist's work is simply mechanical and his field of correcting vision is limited to cases where said correction can be made with the aid of mechanical instruments only." Another witness testified that an optometrist had a knowledge of "theoretic as well as practical optics, a knowledge of the construction of the human eye and its nerve supply," and that an ophthalmologist "deals with the condition of the eye, more particularly as to diseased conditions, as well as practising optometry."

The defendant does not contend that he has not violated the terms of St. 1912, c. 700, which purports to regulate the practice

of optometry, but that that subject is beyond the power of legislative control and that the statute violates the Constitution both of the United States and of the Commonwealth. That statute provides in § 1 that "The practice of optometry is defined to be the employment of any method or means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof." Sections 2, 3, 4 and 7 relate to the appointment, meetings, records, reports and compensation of a board of registration in optometry. By § 5 provision is made for examination, certification and registration of practitioners in optometry, and by § 8 for the revocation of such certification for designated causes. Every such practitioner is required by § 6 to display conspicuously his certificate in his place of business and to deliver to customers served away from his place of business certain identifying information. Physicians and surgeons lawfully entitled to practise medicine and persons who merely sell spectacles, eyeglasses and lenses on prescription or as merchandise, without practising optometry, are exempted from the scope of the act by § 10. A penalty is imposed by § 9 for practising, holding himself out as practising or attempting to practise optometry contrary to the terms of the statute.

It is too well settled to require extended discussion that whatever rationally tends to the promotion and preservation of the public health is within the police power of the State. One means to this end is the examination and certification by a public board of those who profess to treat physical or mental ailments or to cure disease, or who hold themselves out as possessing unusual skill in assuaging any of the ills of the flesh or overcoming defects or deficiencies of any of the main organs of the body. The public thus are protected from being imposed upon by the ignorant or misled by the specious but unqualified.

It has been held in numerous cases that the practice of medicine is subject to reasonable public regulation by the several States under the police power without offending any provision of the Federal Constitution. *Dent v. West Virginia*, 129 U. S. 114. *Hawker v. New York*, 170 U. S. 189. *Reetz v. Michigan*, 188 U. S. 505. *Watson v. Maryland*, 218 U. S. 173. It has been decided in this Commonwealth that such a statute violates no provision of our Constitution. *Commonwealth v. Jewelle*, 199 Mass.

558. It has been held, also, that the power of regulation extends to and includes osteopaths, *Collins v. Texas*, 223 U. S. 288, dentists, *People v. Griswold*, 213 N. Y. 92, and bone setters, *Hewitt v. Charier*, 16 Pick. 353.

The kind of work undertaken by the defendant and described in said c. 700 bears such intimate relation to the health of mankind as to bring it within the power of legislative supervision through the exercise of the police power. Vision is essential to the highest usefulness of the individual. The eye is proverbially a delicate organ. It is closely connected with intellectual, nervous and physical functions. Advice as to its care and prescribing for the correction of its defects by tests and examinations without the use of drugs is closely connected with health. The reasons which have led courts generally to uphold statutes regulating the examination, qualifications and registration of physicians and surgeons against attacks based on alleged inequality of the laws, class legislation, interference with natural rights, and the constitutional liberty of the citizen to earn his living in any lawful calling or to pursue his chosen avocation, are equally applicable to the statute here assailed and equally decisive in sustaining its validity and need not be further amplified.

In *McNaughton v. Johnson*, 242 U. S. 344, a statute of California forbidding the practice of optometry without first having obtained a certificate from a public board was upheld as within the police power of the State and as not violating any constitutional right of the individual theretofore practising optometry without a certificate. The definition of optometry in the California statute in its constitutional aspects differs in no material particular from the definition in § 1 of the statute here assailed. That case was disposed of rather briefly by the court as being comprehended within the principles declared in the decisions already cited which upheld statutes regulating the practice of medicine. To the same effect is *Price v. State*, 168 Wis. 603. We are unable to follow the decision to the contrary in *People v. Griffith*, 280 Ill. 18.

There was sufficient evidence to warrant a finding that the defendant held himself out as a practitioner of medicine contrary to R. L. c. 76, § 8. The use of the words "Doctor of Ophthalmology" on his sign and billheads bears some indication of hold-

ing himself out as a practitioner of medicine. The assertion that he was a graduate of a medical college and was capable of fitting glasses for eye defects, and was able to measure and analyze the nervous system, were representations to the same general effect. The examination of the eye, as already described, shows that as to the eye he acted with every appearance of pretence to special skill in the highly important special branch of medical science relating to the eye. It has been held that the practice of midwifery, *Commonwealth v. Porn*, 196 Mass. 326, of chiropractic, *Commonwealth v. Zimmerman*, 221 Mass. 184, the prescribing of medicine in accordance with revelations made by "occult force" while in a trance, *Commonwealth v. DeLon*, 219 Mass. 217, or a "judgment reached through clairvoyancy," *Commonwealth v. Lindsey*, 223 Mass. 392, are included within the general description of practice of medicine. In *Commonwealth v. Jewelle*, 199 Mass. 558, it was said that there might be a practice of medicine without the dealing out of drugs or prescribing drugs or other substances to be used as medicine. The evidence brings the case at bar well within the authority of these decisions. The rulings requested were rightly refused.

Exceptions overruled.

MORRIS W. POTTER vs. STANLEY A. STARRATT.

Suffolk. December 4, 1919. — March 30, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, & PIERCE, JJ.

Contract, Construction. Practice, Civil, Premature action.

In an action for a breach of a contract in writing, dated October 10, 1916, it appeared that the contract provided that the plaintiff, the owner of certain land in the State of Florida, should deposit \$2,915 in a certain bank to the account of the defendant "to be spent by him in the development and cultivation of" the land; that, in "consideration of the development and cultivation of the land," the defendant should receive one half of the income derived from it "as long as this agreement remains in force;" should "not be prevented from using his own judgment and discretion in the matters of planting, cultivation, and sales on the said land, nor be interfered with in carrying out his plans, while this agreement is in force;" should "improve, develop, and cultivate [the land] to the

best of his skill and ability . . . and . . . make the land produce as much as he can," and should render to the plaintiff a careful and complete account of income and pay to him one half thereof; that expenses should be paid by the plaintiff, the sum originally deposited "to pay for only the production of the first crop raised and harvested in 1917." The plaintiff agreed "that this agreement shall not terminate before January 31, 1919, if so desired by the" defendant, and that the defendant might terminate it at any time after May 31, 1918. The action was brought on August 8, 1917. *Held*, that

- (1) The contract was entire and not divisible;
- (2) The action was prematurely brought;
- (3) The defendant was under no obligation to account to the plaintiff for money paid to him so long as the defendant was endeavoring in good faith to perform the contract according to its provisions.

CONTRACT, with a declaration in two counts, the first count being upon an agreement in writing for the improvement and cultivation by the defendant of land of the plaintiff in the State of Florida, and the second count being for money alleged to have been had and received by the defendant to the plaintiff's use. Writ dated August 8, 1917.

The agreement in writing, signed by the plaintiff and the defendant, was dated October 10, 1916, and, exclusive of the signatures, was as follows:

"The said Morris W. Potter on his part agrees to deposit in the National Shawmut Bank, Boston, on or before the twelfth day of October, 1916, to the account of the said Stanley A. Starratt, and solely under his control, the sum of \$2,915, to be spent by him in the development and cultivation of lands now owned by or under control now of the said Morris W. Potter at Winthrop, near Bonita Springs, in the State of Florida.

"In consideration of the development and cultivation of the land now owned by or under the control of the said Morris W. Potter by the said Stanley A. Starratt, the said Morris W. Potter agrees to give to the said Stanley A. Starratt one half the income derived from produce grown on the lands so owned or controlled by the said Morris W. Potter as long as this agreement remains in force, and further agrees that the said Stanley A. Starratt shall not be prevented from using his own judgment and discretion in the matters of planting, cultivation, and sales on the said land, nor be interfered with in carrying out his plans, while this agreement is in force.

"The said Stanley A. Starratt, on his part, agrees to improve,

develop, and cultivate to the best of his skill and ability the land owned or controlled now by the said Morris W. Potter, and to make the land produce as much as he can. He agrees to render, or cause to be rendered to the said Morris W. Potter a careful and complete account of income, and the sources from which it is derived, and to pay to the said Morris W. Potter one half of the net income.

"The said Morris W. Potter agrees to pay for the crates, barrels, boxes, etc., necessary to send the produce from the said land to market, and to pay for the necessary labor and fertilizers for the cultivation of the said land from year to year, the sum paid on October twelfth, 1916, to pay for only the production of the first crop raised and harvested in 1917.

"The said Morris W. Potter agrees that this agreement shall not terminate before January 31st, 1919, if so desired by the said Stanley A. Starratt, and he further agrees that the said Stanley A. Starratt may terminate this agreement at any time after May 31st, 1918."

In the Superior Court the action was tried before *Wait, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered for him. The motion was denied. The defendant then asked for the following rulings:

"1. That from all the evidence, the action of the plaintiff has been prematurely brought on August 8, 1917, and there must be a verdict for the defendant.

"2. The plaintiff, having voluntarily paid in \$3,000 under the contract with the defendant, if it appears that the plaintiff afterwards broke the contract by bringing action or otherwise by his conduct, he is not entitled to be re-paid any portion of the money paid in."

"6. That the provisions of the contract between the parties do not impose any trust upon the defendant to account for the moneys paid to him by the plaintiff, so long as the defendant was in good faith endeavoring to perform his contract as required by the terms thereof."

"10. That according to the terms of the contract between the parties, the defendant was not obliged to spend the full sum of \$2,915 in the development and cultivation of the plaintiff's land,

but was only called upon to perform his agreement in good faith and according to his best judgment, during the existence of said contract without interference of the plaintiff."

The rulings were refused. The jury found for the plaintiff in the sum of \$2,146.36; and the defendant alleged exceptions.

C. H. McIntyre, for the defendant.

C. H. Donahue, for the plaintiff.

DE COURCY, J. It was provided in the written contract between the parties as follows: Starratt was to improve and cultivate certain land at Bonita Springs in the State of Florida owned or controlled by Potter. He was to use his own judgment and discretion without interference in the work to be done on the land and the sale of the produce, was to render complete accounts and to retain one half of the net income. Potter agreed to deposit \$2,915 in a bank to the account and under the control of Starratt, "to be spent by him in the development and cultivation of" the land. He further agreed to pay for the crates, barrels, etc., necessary for sending the produce to market, "and to pay for the necessary labor and fertilizers for the cultivation of the said land from year to year."

The contract was dated October 10, 1916. It was not to terminate before January 31, 1919; but an option was given to Starratt to terminate it at any time after May 31, 1918. The money was duly deposited in bank on October 13, 1916, and was \$3,000 in amount. Potter went to Florida for the winter in the latter part of October, and Starratt arrived there about November 1. A planting of watermelons was killed by frost in early February, 1917; and a second crop was largely destroyed by drought in the later spring of that year. In July Starratt furnished Potter with a statement, showing expenditures amounting to \$1,335.45. He made preparations to return to Bonita Springs in the early summer of 1917 and was willing to go on with the contract. Potter brought this action on August 8, 1917, after demanding the return of the balance of the money which Starratt had not actually expended on the land. The first count of his declaration was for alleged breach of the contract and the second was for money had and received.

The plaintiff's claim that he can recover in this action, brought some seventeen months before the termination of the contract

period, is based primarily on his contention that the contract was not entire but divisible; that the \$2,915 was appropriated to the first crop alone. Subject to the defendant's exception the presiding judge so construed the contract, and instructed the jury that this provision could be separated from the rest of the contract, and that any portion not used for the production of the first crop was returnable to the plaintiff. In our opinion this is not the correct interpretation of the written agreement between the parties. As already stated, the \$2,915 was "to be spent . . . in the development and cultivation of" the land. But no time within which it must be spent was stated. Starratt was not obliged to expend it all in the production of the first crop. The reasonable inference from the language is that he might spend it according to "his own judgment and discretion," during the term of the contract. This view is consistent with the nature of the joint enterprise, as indicated by the contract as a whole. The only language that throws doubt upon the subject is that contained in the paragraph preceding the last one. This paragraph is a statement of the obligations of Potter, as to payment for crates, boxes, etc., and for the necessary labor and fertilizers from year to year. The clause "the sum paid on October twelfth, 1916, to pay for only the production of the first crop raised and harvested in 1917," was apparently added to make it plain that the \$2,915 was not to be considered as covering all the obligations of Potter to furnish money during the entire contract period.

The exceptions to the judge's construction of the contract as a divisible one must be sustained. The defendant also was entitled to the first and sixth rulings requested by him.

Exceptions sustained.

LILLIAN M. GLOVER vs. WALTHAM LAUNDRY COMPANY
& others.

Suffolk. December 5, 1919. — March 30, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & PIERCE, JJ.

Equity Pleading and Practice, Appeal, Master. *Partnership*, What constitutes. *Trust*, Resulting. *Husband and Wife*. *Corporation*, Resulting trust in shares issued upon incorporation. *Equity Jurisdiction*, Estoppel, Laches, Statute of limitations, To enforce resulting trust.

Upon an appeal from a final decree entered in a suit in equity by order of a single justice who had heard the suit solely upon the report of a master which did not contain a report of the evidence, this court, with reference to the facts found by the master and the power and duty to draw inferences therefrom, stand as did the single justice, unaffected by conclusions reached by him.

Upon an appeal from a decree in a suit in equity entered by order of a single justice who had heard the suit solely upon the report of a master which did not contain a report of the evidence, the facts found by the master must be taken as true unless upon the face of his report they are mutually inconsistent or contradictory and plainly wrong.

A master, who heard a suit in equity in which it was necessary to determine the nature of a business relationship between a certain man and the proprietor of a laundry, found that the man was not a partner in the business and had no interest therein except as an employee. He also found that the man had some customers of his own, whom he brought to the proprietor of the business, that he worked in part on a commission basis, that he induced the proprietor to adopt a trade name signifying a partnership in order that he might represent himself as a partner, that he lent small sums of money to the proprietor and borrowed money from him and that he also drew money in excess of what was due to him, all of which he repaid. *Held*, that the subsidiary facts found by the master were not incompatible with the main finding that the man was not a partner in the business.

A master, to whom was referred a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor, found that, before their marriage, the man, who was without substantial financial resources and was employed by the proprietor of a laundry, conducted negotiations which resulted in the execution by the proprietor, in September of a certain year, of a bill of sale of the goods and chattels of the laundry business to the plaintiff, who then lived in the same house with the man, and the delivery of that instrument to the man. Immediately thereafter the plaintiff, at the laundry and in the presence of the man and of the former proprietor, declared that she was the owner of the laundry and that she took possession of

it. She then had several hundred dollars in a bank. The consideration for the purchase was \$3,000, to be paid in cash. No payment was made until the following February, when the proprietor was given eight promissory notes, each for \$250, made by the plaintiff and indorsed by the man, and \$761.67 in cash, which was withdrawn from the laundry business, and a debt of \$238.33 from the former proprietor to the man was discharged. The notes subsequently were paid from the profits of the business. Books of account were opened in the name of the man. In August, the man purchased real estate in his own name, to which the laundry was moved and where it was conducted in the name of the man. He and the plaintiff were married the next year. The master without a report of the evidence found that in all the transactions the man acted as the agent of the plaintiff. *Held*, that

(1) The subsidiary findings of the master were not incompatible with the finding that the man was acting as the plaintiff's agent;

(2) It must be taken as a fact that the business was purchased by the plaintiff;

(3) The circumstance that a part of the purchase price was furnished by the man through the discharge of the debt owed to him by the former proprietor did not cut down the effect of the main finding that the title passed to the plaintiff.

The master in the suit above described further found that, for eight years after the purchase of the business by the plaintiff, her husband with her acquiescence carried on the business as though it were his own, that there was no actual gift nor transfer of the business by her to him and that from time to time she claimed it as her own; that then, with the full knowledge and acquiescence of the plaintiff, he caused a Massachusetts corporation to be formed to which he gave a bill of sale of the business in his own name in return for two hundred shares of stock, one of which was given to the plaintiff, who became a director, one to a nominee of his and the remaining shares to himself; that some property owned by the husband in an outside venture was included in the conveyance to the corporation and formed part of the consideration for the issue of shares, but that that property was valueless because the venture was a failure; that the husband continued to manage the business until his death three years later; that no dividends ever were declared, although he received as profits more than \$27,000 and the plaintiff received several thousand dollars. Very shortly after the husband's death the plaintiff asserted her claim to the executor of his will, and within three years brought this suit. *Held*, that

(1) The identity of the shares of stock, standing in the name of the plaintiff's husband and of his nominee, as representing what previously was her property, was established;

(2) The circumstance that property of the husband in an outside venture, which proved valueless, was part of the consideration for the shares issued to him was of no consequence;

(3) Since the defendant executor stood in the same position as had the plaintiff's husband, to whom her property had been entrusted and who was in no way deceived by her conduct, the plaintiff was not estopped to assert her claim in this suit;

(4) In the absence of any finding that the rights of any creditor of the business, either before or after the incorporation, were placed in jeopardy, the plaintiff was not estopped to assert her claim by reason of her having permitted her husband to hold himself out as the owner of the business;

(5) It not appearing that there had been any delay on the part of the plain-

tiff which had caused her husband or the executor of his will to sleep on his rights, the suit was not barred by laches;

(6) The suit was not barred by the statute of limitations;

(7) A decree should be entered directing that the shares of stock in the corporation which had stood in the name of the husband and his nominee should be conveyed to the plaintiff, and that there should be an accounting to her for dividends received thereon.

BILL IN EQUITY, filed in the Supreme Judicial Court on March 5, 1912, and afterwards amended, against the Waltham Laundry Company, a Massachusetts corporation, Samuel D. Elmore, executor of the will of Clarence F. Glover, late of Waltham, and Seymour Glover, seeking in substance to impress with a trust one hundred and ninety-eight shares of the capital stock of the defendant corporation issued to Clarence F. Glover and held by the defendant Elmore as the executor of his will, and one share issued to the defendant Glover, and to compel their transfer to the plaintiff, who alleged that they were issued in payment for a laundry business owned by her and sold by her to the corporation.

The defendants severally filed, in the same documents, demurrers, and answers which stated expressly that they did not waive the demurrers. The grounds of the demurrers were, in substance, want of equity, multifariousness, misjoinder of parties, inconsistency of allegations and of relief asked for, and that the plaintiff had plain, adequate and complete remedies at common law and in the Probate Court.

The demurrers were heard by *Hammond, J.*, who filed the following memorandum: "I am of the opinion that many of the questions raised by the demurrers can be better considered at the hearing on the merits. The demurrers are accordingly overruled without prejudice to the right of the defendants to raise the questions at the hearing upon the merits."

No interlocutory decree was entered in accordance with the foregoing order and no appeal from the order was claimed.

The answers of the defendants admitted that on January 26, 1911, the defendant Elmore wrote to the attorney for the plaintiff a letter reading as follows: "Permit me to assure you that as Executor named in the will of Clarence F. Glover, I shall be ever ready to acknowledge the fact that Mrs. Glover, very shortly after Mr. Glover's death, informed me that she had a claim upon the Waltham Laundry property, asserting that it belonged to her-

self. Such being the fact I, as such Executor, should never feel justified, and should not at any time in the future undertake to take any advantage of any failure on her part to assert her claim, whatever it may be, to the same by legal proceedings during the time which has elapsed or is to elapse while the controversy regarding the probate of Mr. Glover's will continues."

The suit was referred to a master. The material findings of the master, who did not report the evidence, are described in the opinion. All parties filed objections and exceptions to the master's report. The plaintiff afterwards waived her exceptions. The defendants' exceptions were heard by *Crosby, J.*, who made the following memorandum:

"1. The plaintiff's exceptions were waived in open court. The defendants' exceptions were overruled and an interlocutory decree is to be entered confirming the report.

"2. I find, as an inference of fact from the facts found and reported by the master, that the plaintiff has not sustained the allegations of the bill and therefore cannot recover. A final decree is to be entered dismissing the bill with costs."

Interlocutory and final decrees were entered in accordance with the order of the single justice. The defendants appealed from the interlocutory decree and the plaintiff from the final decree.

R. Spring, (*F. M. Carroll* with him,) for the plaintiff.

E. R. Anderson, (*S. D. Elmore* with him,) for the defendants.

F. C. Allen, for the defendant Glover, submitted a brief.

Rugg, C. J. This is a suit in equity brought by the widow of Clarence F. Glover against the executor of his will and others in substance seeking to impress with a trust in her favor shares of stock in a corporation known as the Waltham Laundry Company.

This case has been referred to a master, was heard upon the master's report alone by the single justice, and comes before us on appeal from a final decree entered by him. This court stands with reference to the facts found and the power and duty to draw inferences as did the single justice, unaffected by the conclusion reached by him. Where findings and inferences rest upon the observation of witnesses who have testified orally, the appellate court does not reverse unless plainly wrong; but where the facts all are documentary or are in a master's report, then this court

on appeal has the same functions as a single justice and draws the proper inferences for itself. *Rioux v. Cronin*, 222 Mass. 131, 134. *Harvey-Watts Co. v. Worcester Umbrella Co.* 193 Mass. 138. *Dominion Trust Co. v. New York Life Ins. Co.* [1919] A. C. 254, 257. *Bacon v. Abbott*, 137 Mass. 397, 399. *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 200.

The evidence is not reported. Therefore the facts found by the master must stand unless upon the face of his report they are mutually inconsistent or contradictory and plainly wrong. *Crane v. Brooks*, 189 Mass. 228. *Young v. Winkley*, 191 Mass. 570, 573.

The master found that in 1897 the deceased, Clarence F. Glover, having had some experience in the laundry business, went to work for one Simes, who was conducting a laundry in Waltham, for a weekly salary and a commission and continued in this employment until September 22, 1898. The deceased then was without substantial financial resources. He lived in the same house with the plaintiff, at that time unmarried, who had several hundred dollars in the bank. The master found that the deceased was not in fact a partner with Simes and had no interest in the business except as employee. This finding is quite consistent with the other findings and appears to be the rational inference from the general relation of the parties. Although the deceased had some customers of his own, whom he brought to Simes, worked in part on a commission basis, induced Simes to adopt the trade name of Frank Simes and Company so that he could represent himself as partner to the knowledge of Simes, lent small sums of money to Simes and borrowed from him and drew money in excess of the amount due him, all of which were repaid by each debtor, these facts are not incompatible with the main finding that the deceased was not a partner with Simes.

On September 22, 1898, Simes executed and delivered to the deceased a bill of sale running to the plaintiff of the goods and chattels of his laundry business. The negotiations for this purchase were conducted by the deceased on the plaintiff's behalf and on the day on which the bill of sale was delivered, or the day after, the plaintiff went to the place where the laundry business was carried on and in the presence of Simes and the deceased declared that she was the owner of the laundry and that she took

possession of it. The consideration for the purchase was agreed to be \$3,000, to be paid in cash. It was not paid until February, 1899, when eight promissory notes, each for \$250, were made by the plaintiff, indorsed by the deceased to the order of, and delivered to, the attorney for Simes. The remaining \$1,000 of the purchase price was paid by the sum of \$761.67 in cash withdrawn from the laundry business and by the cancellation of \$238.33 of indebtedness from Simes to the deceased. The notes subsequently were paid in whole or in part out of the profits of the laundry. The laundry business was conducted by the deceased, under the name of "Clarence F. Glover doing business as C. F. Glover & Co." and "Waltham Laundry, C. F. Glover & Co. Props.," until 1906. The plaintiff and the deceased were married in 1900 and lived together until his death in 1909. Books of account were opened in the name of the deceased. In August, 1899, he bought real estate to which the laundry was moved and upon which the business was conducted thereafter.

There is no incompatibility with other facts found in this finding that the deceased acted for the plaintiff and in her behalf in negotiating for her the purchase of the personal property on September 22. That finding means that the deceased negotiated the purchase of the chattels as agent for the plaintiff, who was the purchaser. The plaintiff at that time was possessed of some property; the deceased was worth substantially nothing. She was responsible for the purchase price. She was the maker of notes aggregating two thirds of that price. Most of the cash paid was withdrawn from the profits of the business. The fact that she was named in the bill of sale as the vendee and took possession of the property in person in the presence of the vendor and of the deceased, and was maker of the notes, are facts of dominating significance in determining who was the purchaser. There is nothing inherently repugnant to the fact that she was in truth the purchaser and the owner of the business in the subsequent conduct of the deceased with reference to the property and business, he being her husband for the larger part of the time. It is not necessary further to review the findings of the master in this particular. See *Briggs v. Sanford*, 219 Mass. 572, and *Hutchins v. Mead*, 220 Mass. 348.

The circumstance that a part of the purchase price of the prop-

erty was furnished by the deceased through the discharge of his debt against Simes does not cut down the effect of the main finding that the title passed to the plaintiff. *Patterson v. Patterson*, 197 Mass. 112, and cases collected at page 117.

The plaintiff had possession of the bill of sale and introduced it in evidence. The master found that it was delivered to her by the deceased. This finding is not irreconcilable with other facts found. It is in accordance with the presumption of propriety in conduct in the absence of evidence of surreptitious and unlawful appropriation. *Collector of Taxes of Boston v. Rising Sun Street Lighting Co.* 229 Mass. 494, 497.

The findings that the business after September 22, 1898, and before October 1 following was conducted by the deceased on behalf of the plaintiff and not for Simes and Company, and that from and after September 23 the receipts and disbursements of the business by the deceased were as agent for the plaintiff, are not repugnant to other facts found but seem to follow naturally from the establishment of the main proposition that the plaintiff was the purchaser of the property by the bill of sale of September, 1898.

It must be taken as a fact that the purchase of the property was by the plaintiff and not by the deceased and that the business was at the first started and carried on by the deceased for the plaintiff. Thereafter, up to 1906 the deceased acted as if he were the owner of the business, and conducted it as though it were his own with the knowledge and acquiescence of the plaintiff, who was familiar in a general way with the books and the way in which he carried on the business. The finding of the master is that there was no actual gift or transfer to the deceased of the plaintiff's right and title to the property and business, and that she claimed from time to time that the business belonged to her. The facts do not show that the plaintiff relinquished her title to the property or the business, or conveyed it in any way to the deceased. Ownership by the plaintiff being once established, the natural inference is that, in the absence of facts showing the contrary, the ownership continued the same. In view of that fact, the acts of the deceased in respect of management and control of the property of his wife presumably were as agent for her and in her interest and behalf. *Chace v. Chapin*, 130 Mass. 128. There is no

finding of a gift by the plaintiff to the deceased of the property or business. The facts found do not seem to us to require or support that inference. Indeed, the finding is to the contrary.

In 1906 the Waltham Laundry Company was incorporated under the laws of Massachusetts with a capital of \$20,000 divided into two hundred shares. The deceased brought about the organization and at his invitation the plaintiff, his brother, Seymour Glover, and one Grover acted with him as incorporators, participated in their meeting, and in the election of its officers and in the passage of a vote to purchase "the machinery, merchandise, bills receivable and good will of the laundry and cleansing business heretofore carried on by Clarence F. Glover," and to assume all its contracts, debts and obligations. The deceased executed a bill of sale of the laundry property and business in his own name to the corporation, the terms of which were stated in the plaintiff's presence and hearing. The plaintiff was fully aware of this transfer by the deceased to the corporation and acquiesced therein and made no claim of ownership. She was a director from the organization until the death of the deceased, and knew that one hundred and ninety-eight shares of stock were held by the deceased and one each by Seymour Glover and herself. After the organization of the corporation until the death of her husband he continued to manage the business in substantially the same manner as before. No dividends were declared but profits were paid to the deceased and charged to him on the books of the corporation to an amount exceeding \$27,000. During the entire period the plaintiff received from the deceased sums of money to the amount at least of several thousand dollars, the exact amount not being found. The plaintiff also loaned money to the deceased from time to time.

The facts show that the property purchased by the plaintiff in 1898 and used in her business and increased and enlarged in amount by the management in her behalf up to 1906, is now represented by shares of stock in the corporation. The identity of the stock as representing that which previously was her property is established. *Peoples National Bank v. Mulholland*, 228 Mass. 152, 158, and cases there collected. *Low v. Jones*, 192 Mass. 94, 101. *Newell v. Hadley*, 206 Mass. 335, 356. The circumstance that some property owned by the deceased in an out-

side adventure was included in the conveyance to the corporation is of no consequence in this connection, because that business had been a failure and property from this source appears to have been negligible in value. See *Davis v. Downer*, 210 Mass. 573, 575.

The plaintiff is not estopped from setting up her claim to the stock. The executor of the deceased stands in no better position than the husband himself would, if living, and as against him she might assert her rights in equity. Manifestly he being the person to whom property was entrusted, could not rightly contend that the plaintiff as owner was thereby foreclosed from asserting her title.

There is no fact which seems to us to justify an inference that the plaintiff's conduct misled the deceased to his harm in any particular. *Plumer v. Lord*, 9 Allen, 455. *Boston & Albany Railroad v. Reardon*, 226 Mass. 286, 291. Facts constituting an estoppel between the original parties are absent. The fundamental fact is that the plaintiff was the original purchaser of the property and that the business in its initial stages was conducted by the deceased in her behalf. This was all with the knowledge of the deceased because he acted as her agent. This knowledge must be held to have stayed with the deceased and to have colored all his transactions respecting the property and business. Thus, as between the plaintiff and the deceased, there has never been any basis for estoppel. Their acts all are affected by their knowledge of facts essentially at variance with the underlying conception of estoppel.

The general trend of authority is that where a wife vests her husband with the title and possession of property and permits him to hold himself out to the world as owner and others give him credit on the strength of this appearance, she is estopped to deny as against such creditors to the extent of their debts that he was the owner. *Rioux v. Cronin*, 222 Mass. 131, 135, note, and cases there collected. Doubtless the same rule applies to like conduct of others. *Savage v. Darling*, 151 Mass. 5. *Russell v. American Bell Telephone Co.* 180 Mass. 467. That principle is not germane to the issues here presented. No creditor is a party to these proceedings. The only finding is that "In at least one instance credit was extended to said Glover in reliance upon

representations by him that the business belonged to him and that the person extending such credit was and is a creditor of the estate of" the deceased. That finding falls short of anything approaching an estoppel to the plaintiff from asserting her title.

The plaintiff is not barred by laches. No facts are found to the effect that during the life of the deceased he failed to recognize as between himself and the plaintiff her rights to the property in such way as justly to satisfy her by payments of money directly to her or expended in her behalf. There does not appear to have been under all the circumstances unreasonable delay operating to the prejudice of the deceased. *Haven v. Haven*, 181 Mass. 573, 579. Delay is chiefly of consequence when good faith requires vigilance in asserting one's rights.

Manifestly the facts do not show that the plaintiff's rights have been barred by the statute of limitations. *Davis v. Coburn*, 128 Mass. 377.

The taking of the shares of stock in the corporation in the name of the deceased in return for her property conveyed to it presents the usual case of resulting trust. The plaintiff furnished the consideration, the title being taken in the name of the deceased. *Lufkin v. Jakeman*, 188 Mass. 528. *Howe v. Howe*, 199 Mass. 598. *Cooley v. Cooley*, 172 Mass. 476.

The defendant Seymour Glover stands in this connection on the same footing as the deceased. He paid nothing for his share of stock but the entire subscription price therefor was paid by the property of the plaintiff. A trust therefor results in her favor.

The Waltham Laundry Company obtained a clear title to all the property conveyed to it. The plaintiff plainly is estopped to set up any claim against it.

Assuming in favor of the defendants, but without so deciding, that consideration of the demurrer is open on the record, it is sufficient to say that it was overruled rightly. *Fourth National Bank of Boston v. Mead*, 214 Mass. 549, is plainly distinguishable.

The result is that the decree dismissing the bill is reversed and a new decree is to be entered establishing the title of the plaintiff by way of resulting trust to the one hundred and ninety-eight shares of stock in the corporation which stood in the name of the deceased and to the one share standing in the name of Seymour

Glover, declaring that these shares are held in trust for her, and directing these shares transferred to her, and ordering an accounting for dividends received thereon, and for her costs.

So ordered.

CHATHAM MANUFACTURING COMPANY vs. AVERY CHEMICAL
COMPANY.

Suffolk. January 13, 1920. — March 30, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & CARROLL, JJ.

Contract, Construction. Option.

If, in a contract in writing for the sale of a certain quantity of merchandise, the seller is given the option of increasing the quantity of the merchandise to be sold by a certain amount but the contract does not specify a time within which the option shall be exercised, the buyer will not be bound by an exercise of the option which does not occur within a reasonable time.

A contract in writing for the sale of five hundred barrels of pyroligneous acid gave the seller an option to increase the number of barrels to twenty-five hundred barrels, but stated no time within which the option should be exercised. The contract was made on January 17, 1918. The acid was for use in dyeing khaki cloth for the use of the national government in the World War, and this was known to the seller. The seller's average weekly output was seventy-five barrels. *Held*, that an exercise of the option by the seller on August 15, 1918, would not be given within a reasonable time.

On May 23, following the making of the contract in writing above described, the seller had not yet delivered any of the acid and gave notice to the buyer that he was "about ready to ship . . . but owing to the big delay considered it advisable and only just to you to first place the facts and circumstances before you." The buyer replied on May 29 that he "would be pleased to receive the Pyro Acid, which we purchased from you on contract." *Held*, that the above letters contained no extension of the time within which the seller must exercise the option of increasing the amount of acid to be shipped.

In the circumstances above described, the buyer on August 8, 1918, wrote to the seller asking him to "discontinue shipments of Pyro Acid Water until further notice." At that time one hundred and twenty-five barrels had been delivered and paid for. At the hearing by a judge without a jury of an action by the seller against the buyer for damages resulting from the plaintiff being prevented from delivering and receiving pay for twenty-three hundred and seventy-five barrels, the plaintiff asked for a ruling that the time within which he could exercise his option to increase the amount to be delivered to twenty-five hundred barrels was extended by the letter of August 8 and subsequent correspondence. The judge gave the ruling with the qualification that the extension was

for a reasonable time thereafter. *Held*, without intimating that the letter of August 8 did so extend the time for the exercise of the option, that the plaintiff had no reason for complaining of the giving of the qualified ruling.

On August 15, under the circumstances above described, the plaintiff wrote to the defendant and, after referring to the cause of delay and the correspondence with the defendant, and to the contract as one for three thousand barrels, stated, "We . . . took the matter up with you about June 1st when you stated we could go on and ship. We therefore naturally concluded that the contract was reinstated and that we would be able to ship the above quantity." *Held*, that the letter was not an exercise of the option given to the plaintiff in the contract.

An exercise of the option above described in a letter of November 20, 1918, was *held* not to have been within a reasonable time after August 8.

CONTRACT for breach of an agreement in writing for the manufacture by the plaintiff and sale to the defendant of pyroligneous acid. Writ dated February 5, 1919.

In the Superior Court the action was heard by *Jenney, J.*, without a jury.

The agreement in writing, signed by the defendant by its vice president, Allen O. Claffin, read as follows:

"January 17th, 1918.

"The Avery Chemical Co. hereby agrees to buy and the Chatham Mfg. Co. hereby agrees to sell, 500 bbls of their Pyro acid on a basis of 5c per gal for 5% acid bbls to be charged extra at price paid therefor. This price is f.o.b. Savannah steamers and goods to be paid for on the 5th of each succeeding month for goods received in preceding month and on the 25th of the succeeding month for goods shipped in the preceding month but not received before the 5th. At the option of the Chatham Mfg. Co. the amount of acid to be delivered may be increased to 2500 bbls. It is understood that acid will not be shipped that averages much under 4½%. Shipments to begin as soon as possible."

On August 8, 1918, the defendant wrote to the plaintiff the following letter: "We would ask that you kindly discontinue shipments of Pyro Acid Water until further notice." To this the plaintiff replied as follows: "We have your favor of the 8th this morning asking us to discontinue shipments of Pyro Acid until further notice. This is quite a shock to us as we have gone to considerable trouble and expense and in getting up this water. We have wired you stating that we had 50 bbls already for ship-

ment and freight room engaged therefor this week's steamer and asking if we could not send this on, also asked you to state about when we could resume shipments. We hope to hear from you by wire during the day, and sincerely trust this stoppage of shipments is but temporary."

On August 13, the defendant telegraphed to the plaintiff as follows: "Impossible for us to accept Pyro Acid at this time." To this the plaintiff replied by telegram on August 14 as follows: "Telegram recd would you recommend our selecting and storing pyro acid in anticipation shipment being resumed shortly if not could you suggest any one else using it please wire reply our expense." The defendant on the same day telegraphed to the plaintiff as follows: "You may ship us fifty barrels you have ready on a sixty day billing basis would not recommend your storing pyroacid but regret cannot advise of other interested parties. Charge.

Avery Chemical Company."

On August 15, the plaintiff wrote to the defendant the following letter:

"We confirm various telegrams exchanged and thank you for letting us ship the 50 bbls we have made up of Pyro Acid. We understand that we can draw for the value of the bbls at sight and that the balance is to be remitted in 60 days.

"We are naturally considerably upset at the discontinuance of the shipments of the Pyro Acid water and wonder if you would be willing to give some information as to the cause. We have worked hard in getting our plant in condition to supply this and it is unfortunate that just as we get in shape, the shipments are discontinued by you. The situation is that Mr. Claflin left a contract with us when here of about 3000 bbls of this water. We were delayed in shipping any and took the matter up with you about June 1st when you stated we could go on and ship. We therefore naturally concluded that the contract was reinstated and that we would be able to ship the above quantity. It seems strange that in the short time between this reinstatement of contract and your telegram to cease shipments, the situation could change so radically. If it is a question of time in paying for this water we would be glad to meet you in the matter provided we can

continue to draw for the value of the bbls. We supposed that at this time there was a particularly good demand for iron liquor. Is this correct?

"By the way, we sent you a sample of iron liquor we made up and asked if you would be willing to tell us whether it was all right or not. If it is all right we might go on and make it and probably dispose of it throughout the South, thus not coming in competition with you.

"We would greatly appreciate a full letter from you in the matter if you can consistently give it to us."

Other material evidence is described in the opinion. At the close of the evidence, the plaintiff asked for and the trial judge refused the following rulings:

"1. Upon all the evidence the plaintiff is entitled to recover for damages for failure of the defendant to accept deliveries of twenty-five hundred barrels."

"4. The plaintiff had the right to increase the amount of deliveries to twenty-five hundred barrels up to the time which the court finds it was required to complete deliveries of the five hundred barrels."

The plaintiff also asked for the following rulings:

"6. The time within which the plaintiff could elect to increase the deliveries under the contract to twenty-five hundred barrels was likewise continued and extended by the defendant's letter of August 8, 1918, and its subsequent correspondence.

"7. The plaintiff's letters of August 15, 1918, November 20, 1918, and November 23, 1918, constitute an election by the plaintiff to increase the deliveries under the contract to twenty-five hundred barrels."

The judge made the sixth ruling with the addition that the extension was for a reasonable time thereafter. The seventh ruling the judge held to be immaterial because he found that the option, if exercised, was not exercised within a reasonable time, if the question of reasonable time was one of fact, and ruled that it was not exercised within a reasonable time, if it was a question of law.

The judge found for the plaintiff in the sum of \$863.34; and the plaintiff alleged exceptions which, after the qualification of *Jenney, J.*, as a justice of the Supreme Judicial Court, were allowed by *Lawton, J.*

E. E. Gordon, for the plaintiff.

S. R. Miller, for the defendant.

CARROLL, J. By a written contract dated January 17, 1918, the defendant agreed to buy and the plaintiff to sell five hundred barrels of pyroligneous acid at five cents per gallon; at the plaintiff's option, the amount could be increased to twenty-five hundred barrels, "Shipments to begin as soon as possible." This acid was a bi-product from the distillation of soft pine lumber, and formerly was a waste product; but at the time of the contract it was in demand for the making of iron liquor, used in the dyeing and coloring of khaki cloth for the government. This was known to the plaintiff. In the summer of 1918 the demand ceased, and from that time the acid was unsalable and had no market value. The plaintiff's average weekly output, at a cost to it of one half cent a gallon, was seventy-five barrels, each barrel containing about fifty gallons.

None of the acid was shipped to the defendant until the last of July or early in August, when fifty barrels were delivered; and before August 20 a total of one hundred and twenty-five barrels had been delivered and paid for by the defendant. Several letters passed between the parties and on November 23 the defendant notified the plaintiff to ship no more of the acid on its account. The defendant conceded its liability for failure to accept three hundred and seventy-five barrels, and damages at four and one half cents a gallon, amounting to \$863.34, were assessed against it. The plaintiff sought to recover damages for the failure to accept the additional twenty hundred barrels which, under the seller's option, it had the right to deliver. The principal question involved is the ruling of the presiding judge that the option, if exercised, was not exercised within a reasonable time.

No time was limited for carrying the option into effect, and in order to bind the defendant it was essential that it should have been acted upon within a reasonable time. On August 8, the defendant notified the plaintiff to discontinue shipments until further notice. On August 14, it requested the shipment of fifty barrels; on the next day (August 15) the plaintiff wrote the letter quoted in full on pages 342, 343, and on November 23, a letter saying that it expected the defendant to take twenty-eight hun-

dred and fifty barrels of Pyro Acid. All the facts are shown, and it is a question of law, what was a reasonable time for the exercise of the option. *Loring v. Boston*, 7 Met. 409, 413. *Park v. Whitney*, 148 Mass. 278. *Lewis v. Worrell*, 185 Mass. 572, 575. *New England Box Co. v. Prentiss*, 75 N. H. 246. *Fitzpatrick v. Woodruff*, 96 N. Y. 561, 565. *Eaves & Collins v. Cherokee Iron Co.* 73 Ga. 459.

Considering all the circumstances disclosed, in our opinion the option was not exercised within a reasonable time. When the contract was made, our country was engaged in the World War; and the demand for the plaintiff's waste product arose solely from the fact that it was of value in dyeing and coloring the clothing of soldiers. When that demand was supplied, the acid contracted for ceased to be salable and had no market value. The plaintiff knew this. It must also have known that the time for the fulfilment of the contract was important and of its very essence. The plaintiff could produce seventy-five barrels each week, and in the ordinary course of its business it was to be expected that the five hundred barrels contracted for would be ready for delivery before April 1. No notice was then given that it intended to rely on the option; and there was no intimation that it intended to exercise the option until months after the contract was signed. The option could not remain open indefinitely and the plaintiff understood that the contract was executed because of the important crisis then existing. Even if the letter of August 15 were a sufficient notice of the plaintiff's intention to fulfil the option, and assuming that the defendant's letter of August 8 did not extend the time for the exercise of the option, this notice was not given within a reasonable time and it could not bind the defendant to accept deliveries.

On May 23 the plaintiff wrote explaining the delay and stating that it was "about ready to ship water, but owing to the big delay considered it advisable and only just to you to first place the facts and circumstances before you;" to which the defendant answered May 29, saying, "we would be pleased to receive the Pyro Acid, which we purchased from you on contract." Although the defendant admitted that the time for delivery of the five hundred barrels called for in the contract was extended by agreement beyond the reasonable time required by law, as we construe

the defendant's letter of May 29, this extension of time related solely to the five hundred barrels called for in the written contract and did not extend the time for the exercise of the option. The defendant's letter made no reference to the additional quantity to be supplied at the seller's option and the plaintiff did not refer to the option until August 15. See *Eaves & Collins v. Cherokee Iron Co. supra*. The trial judge, therefore, correctly ruled that upon all the evidence the plaintiff was not entitled to recover for the defendant's failure to accept deliveries of twenty-five hundred barrels.

The plaintiff asked for a ruling, "The time within which the plaintiff could elect to increase the deliveries under the contract to twenty-five hundred (2500) barrels was likewise continued and extended by the defendant's letter of August 8, 1918, and its subsequent correspondence." The judge so ruled with the qualification that the extension was for a reasonable time thereafter. The letter of August 8 asked the plaintiff to "discontinue shipments of Pyro Acid Water until further notice." Without intimating that the letter of August 8 extended the time for the performance of the option, it is enough to say that the plaintiff cannot complain of this ruling, with the qualification. It was as favorable as it could ask.

The plaintiff asked the judge to rule that "the plaintiff's letters of August 15, 1918, November 20, 1918, and November 23, 1918, constitute an election by the plaintiff to increase the deliveries under the contract to twenty-five hundred (2500) barrels." On this question the judge ruled that the request was immaterial, because he found that the option, if exercised, was not exercised within a reasonable time. He previously had ruled in effect that the plaintiff had a reasonable time after the defendant's letter of August 8 to elect to deliver twenty-five hundred barrels.

In the letter of August 15, when one hundred and twenty-five barrels had been shipped, the plaintiff, after referring to the cause of delay and its correspondence with the defendant, and to the contract as one for thirty hundred barrels instead of twenty-five hundred barrels, stated, "We . . . took the matter up with you about June 1st when you stated we could go on and ship. We therefore naturally concluded that the contract was reinstated and that we would be able to ship the above quantity."

This letter is relied on by the plaintiff as a notice of the exercise of the option. We do not think that this is its true meaning; it is not an unqualified notice that the plaintiff then intended to rely on the option and fulfil its conditions, but is a statement of what it concluded from the correspondence and that it would be able to ship; nor does it clearly state that it intended to carry out the option and hold the defendant to the agreement, and was then ready to make shipments. Even if it could be construed as fairly indicating the intent to make the shipments it manifested an intention to deliver thirty hundred barrels. This was not according to the terms of the agreement. The defendant had made no contract for this quantity. The most that the plaintiff could furnish under the contract and option was twenty-five hundred barrels. The letter, even if it be construed as a notice that the plaintiff intended to fulfil the contract as he understood its terms, was not a sufficient notice to fulfil the option contained in the contract and the notice given did not hold the defendant. *Metropolitan Coal Co. v. Boutelle Transportation & Towing Co.* 185 Mass. 391, 396.

The plaintiff wrote to the defendant on August 23, September 7 and September 21, but in none of these letters is there any indication that it intended to rely upon the option and expected the defendant to accept what remained of the twenty-five hundred barrels. In the letter of November 20, the plaintiff wrote: "We still owe you 2850 bbls;" and on November 23, after receiving the telegram with instructions not to manufacture or ship any more acid, on the same day, wrote, "we owe you 2850 bbls of Pyro Acid and naturally expect you to take same." Even if these letters of November 20 and 23 signify a definite purpose to carry out the option and apart from the error in the amount to be shipped, considering the peculiar nature of the contract, the special use to which the material was to be applied, the importance of time and the plaintiff's knowledge, this notice was not given within a reasonable time. The armistice had then been declared, hostilities had ceased and the plaintiff knew that there was no further demand for its product.

Exceptions overruled.

FRANKLIN B. NICKERSON *vs.* EUNICE A. NICKERSON & others.

Barnstable. January 20, 21, 1920. — March 30, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Adverse Possession. Ouster. Tenants in Common. Evidence, Presumptions and burden of proof. Limitations, Statute of. Estoppel. Husband and Wife. Deed. Land Court.

Sole and uninterrupted possession of land, owned in common, by one of the tenants in common with appropriation by him of the profits with the knowledge of the others, if continued for a long series of years, unexplained and uncontrolled by any evidence tending to show a reason for the failure of the other tenants in common to assert rights, furnishes evidence upon which an inference of an actual ouster and adverse possession may and ought to be drawn.

A deed by a married woman in 1865 of her interest in land owned by herself and others as tenants in common is void if her husband did not join therein nor assent to it in writing.

One of the sons and daughters of the owner of land on an arm of the sea, after the death of their father in 1865, purchased the interests therein of his brothers and sisters. The deeds given to him by his sisters were void because their husbands did not join therein nor assent thereto in writing. For forty-three years thereafter he and, after his death, his sole heir, occupied the land in connection with other land owned by them and formerly part of the same farm, worked the whole tract as a farm, made conveyances of it and a mortgage of it, carried on salt works on the shore and paid taxes upon it. In a petition for registration of the title to the land, brought in 1918 by the sole heir of the son who was the grantee in the deed of 1865, the judge of the Land Court found, besides the foregoing facts, that one of the sisters of the grantee had died a widow in 1892, having lived since 1865 but four miles distant from the property and never having made any claim to it, and also found that as to her and her heirs the petitioner had gained a title by adverse possession. *Held*, that the finding was warranted.

A married woman executed a deed of land in 1865 in which her husband did not join and to which he did not assent in writing, and the grantee at once entered into possession of the land. She died in 1889, leaving surviving her husband and children of their union. The husband died in 1900. *Held*, that, until the termination by her husband's death of his tenancy by curtesy, the statute of limitations did not begin to run against her heirs' right in the land, which arose from the fact that her deed was void.

The heirs of a married woman, who in 1865 made a deed of land with full covenants of warranty, in which her husband did not join and to which he did not assent in writing, are not estopped from asserting, fifty-three years after the date of the deed, twenty-nine years after her death and eighteen years after the death of her husband, that the deed was void.

Land owned by a married woman was conveyed in 1851 by a deed of her husband,

in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of his title. The woman survived her husband and died in 1892. *Held*, that the petitioner had gained a title to the land by adverse possession.

Land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title. The widow died in 1889, leaving surviving her husband and children of their union. The husband died in 1900. *Held*, that

(1) The deed of the husband in 1863 conveyed a freehold in the land for his life, leaving rights in reversion in the heirs of his wife;

(2) The owners in reversion were not required to assert their rights in opposition to acts of disseisin by the grantee in the deed of 1863 until the termination in 1900 of the life estate thereby conveyed;

(3) The statute of limitations did not begin to run against the heirs of the married woman until the termination of the life estate in 1900;

(4) The heirs of the married woman were not estopped, by the deed of the husband in 1863 in which she joined for release of dower, from asserting that that deed conveyed only an estate for the life of the husband.

PETITION, filed in the Land Court on November 8, 1918, for the registration of the title to about twenty-six and one half acres of land at Pleasant Bay and Fourside Harbor in Chatham, occupied by the federal government as an aviation station under a lease and an agreement of sale made by the petitioner.

The petition was heard by *Davis*, J. It appeared that one Nickerson owned the land at the time of his death, intestate, in 1847. After his death a portion of it was set off as dower to his widow and, through partition proceedings, the rest of it, exclusive of the reversionary interests in the dower land, was divided among his six children. Thereafter one of the sons, the father of the petitioner, purchased of his brothers and sisters their interests in severalty and in 1865, after the death of the widow, purchased their interests in the dower land.

The issues raised at the hearing related to the validity and effect of some of the deeds conveying the interests so purchased.

The respondents are the heirs of two of the daughters of the original owner, Mehitable Bassett and Eunice Kenney. Material facts found by the judge are described in the opinion. The judge ruled that, upon the facts found by him, so far as the dower lands were concerned, title could, as matter of law, be acquired by adverse possession, and found that it had been so acquired by the

petitioner. As to the title to the land conveyed upon the partition in severalty to Mehitable Bassett, the judge found that the petitioner had acquired a title thereto by adverse possession. As to the title to the land conveyed upon the partition in severalty to Eunice Kenney, the judge in substance ruled that, upon the facts found by him, her heirs were estopped to deny the petitioner's title.

A decree registering the petitioner's title to the entire tract was ordered by the judge; and the respondents alleged exceptions.

W. O. Kyle, for the respondents.

W. A. Morse, for the petitioner.

CARROLL, J. This is a petition to register a tract of land at Pleasant Bay and Fourside Harbor in the town of Chatham, the land in question being a portion of the Nickerson farm purchased by Jesse Nickerson, the petitioner's grandfather, in 1826. Jesse Nickerson died intestate in 1847, leaving a widow and six children, — three daughters and three sons. The daughters were married, their husbands were living, and children had been born to them. Partition was made in the Probate Court among the six children, of all the real estate of which Jesse died seised, except the reversion of the northeasterly portion of the farm, which had been set off as dower to his widow.

One of the sons, Jesse Nickerson, Jr., father of the petitioner, in 1851 purchased the share which had been assigned to his sister Mehitable, the deed being executed by her husband, Isaiah C. Bassett, his wife joining merely to release dower, the land being described by metes and bounds. In 1863, Jesse, Jr., received a deed of the lot assigned to his sister Eunice, this deed being executed by her husband Nathaniel K. Kenney as grantor, she releasing dower and the land being described by metes and bounds. Jesse Nickerson, Jr., in 1851, purchased the land assigned to his sister Tamson and that assigned to the representatives of his brother Sabina. In 1864 he purchased the lot assigned to his brother David. The widow of Jesse Nickerson, Sr., died in 1862. In 1865 Jesse Nickerson, Jr., purchased from the heirs all of the land set off in dower to their mother and received from them a deed with full covenants of warranty, the sisters signing the deed of conveyance as grantors, but none of the husbands signing as grantors or otherwise.

From the time of these conveyances until his death in 1900, Jesse Nickerson, Jr., lived on the farm in full and exclusive occupation, cultivating it as tillage, mowing and pasture land, fencing it, paying taxes, mortgaging and selling parts of it and conducting salt works on the shore. He died intestate, as did his widow who died in 1904, leaving as their only heir the petitioner, who has continued in full and exclusive occupation of the locus; and neither the possession nor title of the petitioner or of his father has been questioned by any one until the examination of the title in these proceedings preparatory to the conveyance of the estate for an aviation station revealed the exact nature of the deeds and the questions of law raised in connection with them.

The heirs of Tamson assented to a decree for the petitioner. The heirs of Eunice and Mehitable are the respondents. They say that the deeds of the reversion of the dower land and the deeds of the lots assigned to Eunice and Mehitable were, so far as their interests are concerned, invalid, and that no title can be acquired against them, either by estoppel or adverse possession.

1. As to the land set off to the widow of Jesse Nickerson, Sr., the reversion in this land belonged to the six children as tenants in common; and while their respective shares could be disposed of and the title transferred by a deed in proper form, it was the settled law of this Commonwealth at the time the conveyances were made that the separate real estate of a married woman could not be conveyed by her deed. At common law, the husband during coverture had full title to the rents and profits of the wife's real estate. *Clapp v. Stoughton*, 10 Pick. 463, 469. He had a freehold estate which he might convey. *Austin v. Charlestown Female Seminary*, 8 Met. 196, 204. With exceptions not here material, prior to St. 1874, c. 184, Gen. Sts. c. 108, (see now R. L. c. 153,) the conveyance of land by deed of a married woman during her coverture transferred no title. The instrument was void and of no effect in law and equity. *Wing v. Deans*, 214 Mass. 546. In 1865, when the warranty deed purporting to transfer the reversion in the dower estate was signed by Mehitable and Eunice, both were married; and as their husbands did not join with them in the conveyance, the deed, so far as they were concerned, was wholly invalid and transferred none of their interest in the reversion.

The petitioner contends, however, that his father, from 1865 until his death in 1900, was in exclusive and adverse occupation under a claim of right of all the locus, including the dower land, and that from the time of his father's death the petitioner himself has been in adverse possession of the estate. To this the respondents reply that as Jesse Nickerson, Jr., was a tenant in common with the other owners when he entered on the land in 1865, his possession was not adverse to them, but was in support of the common title and there was no adverse possession by him while he occupied the premises.

It is true as a general rule that the possession of one tenant in common, even if exclusive, it being consistent with the right of his co-tenant, is not a disseisin, and an ouster or some equivalent act is necessary to accomplish this, and the sole possession of land by a tenant in common with the receipt of the profits will not alone be sufficient evidence of an ouster. But after the sole possession and appropriation of profits have been continued with the knowledge of the co-tenants for a long series of years, a presumption does begin to arise against them. *Ingalls v. Newhall*, 139 Mass. 268, 271. It was said by Bigelow, C. J., in *Lefavour v. Homan*, 3 Allen, 354, 355, "It may however be safely said that a sole and uninterrupted possession and pernancy of the profits by one tenant in common, with the knowledge of the other, continued for a long series of years without any possession or claim of right and without any perception of profits or demand for them by the co-tenant, if unexplained or controlled by any evidence tending to show a reason for such neglect or omission to assert a right, will furnish evidence from which a jury may and ought to infer a natural ouster and adverse possession." A conveyance of the premises, in connection with the other acts, may be evidence of a disseisin. See *Ingalls v. Newhall*, 139 Mass. 268, 273. As expressed by Shaw, C. J., in *Rickard v. Rickard*, 13 Pick. 251, 253, in speaking of an ouster by one tenant in common, "It is also now well settled, that a long exclusive and uninterrupted possession by one, without any possession, or claim for profits by the other, is evidence from which a jury may and ought to infer an actual ouster." *Joyce v. Dyer*, 189 Mass. 64.

Applying these principles and considering all the facts shown, the ruling of the judge of the Land Court that title to the dower

lands could be acquired against the heirs of Mehitable by adverse possession was right; and his finding that it had been so acquired by the petitioner was fully warranted. Jesse Nickerson, Jr., lived on the farm for twenty-five years, and after his death the petitioner continued to occupy the premises. It was not until eighteen years later that their title was questioned. During the lifetime of Mehitable she lived in Chatham, but four miles distant from the locus, and no claim was made on the petitioner or on his father. It must have been known that the exclusive occupation of the land was claimed by the petitioner and his father, and that they dealt with it as their own, using the dower land, as well as the land assigned in severalty, as their farm. While in the possession of the petitioner's father a portion of the dower land was conveyed, and during the occupancy of the petitioner he too conveyed the entire farm to his wife, which, upon her death, was reconveyed to him. In 1906 he conveyed by mortgage the entire tract, and sold portions of the farm and gave various mortgages. Taxes were paid by the petitioner and by his father. They fenced the land and cultivated it and carried on salt works on the shore. While it does not appear that all of these acts relate exclusively to the dower land, the petitioner, as his father before him, openly occupied all the land as his farm and residence. These facts amply warrant a finding that Mehitable and her heirs must have had knowledge of the occupation of the premises for more than twenty years, of the various acts indicating ownership, and that the occupation was under a claim of exclusive possession. Thus a lawful title was in fact acquired.

Although the premises were in the adverse possession of the petitioner and of his father during the coverture of Eunice Kenney and Mehitable Bassett, they had no right to begin an action for the recovery of the land, nor right to make an entry thereon. They were, as the law provided at that time, under the disability of marriage. *Austin v. Charlestown Female Seminary, supra*. See *Wallingford v. Hearl*, 15 Mass. 471; *Bruce v. Wood*, 1 Met. 542; *Clapp v. Stoughton, supra*; Pub. Sts. c. 196, §§ 5, 6; Gen. Sts. c. 154, §§ 5, 6. Mehitable died in 1892. Her husband died in 1875. The heirs of Mehitable therefore are barred by the statute of limitations and they have no estate in the lands set off in dower to the widow of Jesse Nickerson.

Eunice died in 1889. Nathaniel K. Kenney her husband survived her. He died in 1900. Although the heirs of Eunice claim under her and not under her husband, the statute of limitations did not begin to run against them on her death, because the common law estate by curtesy intervened for the life of her husband. During his lifetime the heirs of Eunice could not bring an action to recover the land, *Miller v. Ewing*, 6 Cush. 34, *Tilson v. Thompson*, 10 Pick. 359, *Jackson v. Johnson*, 5 Cowen, 74, 95, 96, and as the limitation period provided by the statute had not ended when the petition was filed, the heirs of Eunice are entitled to her share in the dower lands. Pub. Sts. c. 196, § 3, cls. 2, 3. Gen. Sts. c. 154, § 3, cls. 2, 3.

The principle of estoppel is not applicable to the facts here disclosed. While the deed of Eunice Kenney purported to convey the dower land, it in fact conveyed nothing, and, as we have said, was void and of no effect. It did not estop her nor her heirs. *Mason v. Mason*, 140 Mass. 63. *Lowell v. Daniels*, 2 Gray, 161. *Pierce v. Chace*, 108 Mass. 254, 258, 259. *Pells v. Webquish*, 129 Mass. 469, 472. See *Nolin v. Pearson*, 191 Mass. 283. She was prevented from entering on the land as hers and taking possession, solely because she was disabled by marriage, the law at that time providing that the husband held the title to his wife's lands during coverture. The husband was not a party to the deed of his wife purporting to convey the dower lands and he was not estopped by this conveyance; and at her death his estate of curtesy became consummate. During that estate by the curtesy, which was for the life of Nathaniel Kenney, Mrs. Kenney's heirs could not enter on the land by reason of the express terms of the statute. *Tilson v. Thompson*, *supra*. Pub. Sts. c. 196, §§ 1, 3, cls. 2, 3. Gen. Sts. c. 154, § 3. *Snow v. Hutchins*, 160 Mass. 111, is not in point. In that case the demandant's husband conveyed her lands, she assenting in release of dower, and the husband took in exchange for this conveyance a farm belonging to the tenant. There was evidence that the demandant knew the deed purported to convey a good title to the demanded premises and also knew that the tenant took possession and occupation of the premises and did work on the land in preparation for building a house. The deed of the premises was made in 1882, after the disability of married women to convey land had been re-

moved. St. 1874, c. 184. The writ of entry in that case was not brought until 1892. It was decided that the evidence warranted a finding that the demandant was estopped to claim the land against the tenant. The deed in that case was not void, the demandant was a party to it and she could, when the deed was executed, have given the purchaser a complete title, except that she could not, without his written consent, destroy or impair her husband's tenancy by the curtesy.

2. As to the lands which were assigned to Eunice and Mehitable and held in severalty by them, the contention of the respondents is that the married daughters, having acquired their interests on their father's death in 1847, held under the common law; and that at common law the husband had a freehold estate in his wife's lands during coverture, which he could sell and which during that period might be taken from him under execution. The deeds of the husbands of Mehitable and Eunice to Jesse Nickerson, Jr., the petitioner's father, operated to convey all the interests of the husbands and gave to Jesse Nickerson, Jr., the entire right of possession during the lives of the grantors. The deeds of Mehitable Bassett's husband and the husband of Eunice Kenney each conveyed to Jesse Nickerson, Jr., an estate during coverture, and if the husbands survived their wives, the deeds of grant transferred an estate during the lives of the husbands. *Barber v. Root*, 10 Mass. 260, 263. See *Melvin v. Proprietors of Locks & Canals*, 16 Pick. 137; *Bruce v. Wood*, *supra*.

Isaiah Bassett died in 1875. And as Mehitable died in 1892, her heirs are barred by the adverse possession of the petitioner from any share in the lands held in severalty by their ancestor.

Although Eunice, the wife of Nathaniel K. Kenney, died in 1889, her husband did not die until 1900. If the statute of limitations runs from the death of Eunice, her heirs are barred; but if it runs only from the death of her husband, they are not barred. If the husband was a tenant by the curtesy after the death of his wife, or had conveyed this estate to another, the heirs could not bring an action to recover it during his life, because the right of an heir to bring an action which accrues on the death of the ancestor is postponed, if a tenancy by the curtesy or other intermediate estate intervenes, until this intermediate estate expires.

Tilson v. Thompson, supra. Pub. Sts. c. 196, §§ 1, 3, cls. 2, 3. Gen. Sts. c. 154, § 3. R. L. c. 202, § 22. The deed of Nathaniel K. Kenney to Jesse Nickerson, Jr., in 1863, conveyed to the grantee his entire estate, and as Nathaniel had issue by his marriage, he was seised of a freehold for his own life and this freehold estate passed to the grantee. *Melvin v. Proprietors of Locks & Canals, supra.* *Raymond v. Holden*, 2 Cush. 264, 269. *Austin v. Charlestown Female Seminary, supra.* *Gardner v. Hooper*, 3 Gray, 398, 404, 405. During the life of Nathaniel Kenney the owners of the reversion, although they might take notice of any disseisin by the tenant of the particular estate, were not obliged to do so and could wait until the right of entry accrued, when Kenney died, in 1900. *Tilson v. Thompson, supra.* *Miller v. Ewing, supra.* *Wallingford v. Hearl, supra.* The right of the heirs of his wife to bring an action did not accrue until the intermediate estate conveyed by him to Jesse Nickerson, Jr., had expired in 1900, at which time the statute began to run against them. Gen. Sts. c. 154, *supra.* Pub. Sts. c. 196, *supra.*

The principle of estoppel relied on by the petitioner is not relevant to this branch of the case. The deed of Nathaniel Kenney conveyed his entire estate during his life. The right to make the transfer belonged to the husband and the deed of grant was a valid instrument. Whatever estate the husband owned, either for the life of his wife or for his own life, passed to the grantee, and under the statute, Pub. Sts. c. 196, *supra.* Gen. Sts. c. 154, *supra.* the heirs, as owners of the reversion, could not bring an action to recover the land, against the tenant of the particular estate, until the particular estate had ended; and the deed of Nathaniel Kenney did not estop the heirs of his wife from claiming under the independent title derived from her. See *Russ v. Alpaugh*, 118 Mass. 369, 376, 378; *Deans v. Eldredge*, 217 Mass. 583, 588.

It may be well to mention that R. L. c. 132, providing for the rights of a husband or widow in the real estate of the other and the assignment of curtesy by the Probate Court (see in this connection *Smith v. Shaw*, 150 Mass. 297), did not become effective until 1902. *Bunnell v. Hixon*, 205 Mass. 468.

It follows from this, that the heirs of Eunice have an estate in that portion of the tract of land assigned to Eunice and now held

in possession by the petitioner, and in her share of the dower lands.

The exceptions of the heirs of Mehitabel are overruled, and the exceptions of the heirs of Eunice are sustained.

So ordered.

In re WILLIAM LEBOWITCH, petitioner.
WILLIAM LEBOWITCH vs. COMMONWEALTH.

Suffolk. March 11, 1920. — March 30, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Constitutional Law, Secrecy of grand jury proceedings. *Jury and Jurors*. *Practice, Criminal*, Grand jury proceedings, Abatement, Trial together of counts alleging distinct offences, Stay of sentence. *Pleading, Criminal*, Indictment, Plea. *Witness*. *Attempt to Commit Crime*. *Writ of Error*. *Habeas Corpus*.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late.

Even constitutional rights of a defendant under indictment, if they do not affect the jurisdiction of the court over the subject matter of the indictment, must be asserted seasonably.

The soundness of an indictment is admitted by a general plea.

Statement by RUGG, C. J., of some instances where the presence before a grand jury, while a witness is testifying, of persons other than the witness is lawful because it is necessary in order that the grand jury may ascertain the truth as to the matter under investigation.

There is no error in sentencing to the house of correction for thirty months one who has been found guilty on two counts of an indictment severally charging him with separate attempts to commit larceny from the person.

It is not error to place a defendant, charged in two counts of an indictment with distinct attempts to commit larceny from the persons of different individuals, on trial upon both counts of the indictment at the same time.

A refusal by a judge of the Superior Court to stay execution of a sentence imposed upon a defendant who had been found guilty after the trial of an indictment for crime is not subject to review either upon a petition for a writ of habeas corpus or upon a writ of error.

The provisions of R. L. c. 220, § 3, in substance requiring that sentence must be imposed, upon conviction of a crime not punishable by death, notwithstanding the pendency of exceptions, unless the trial judge or a justice of the Supreme Judicial Court shall file a certificate that in his opinion there is reasonable doubt whether the judgment should stand, is constitutional.

In refusing to grant a motion for a stay of execution under R. L. c. 220, § 3, the judge need not state his reasons.

PETITION, filed in the Supreme Judicial Court on April 2, 1919, for a writ of habeas corpus commanding the production before the court from the House of Correction in Suffolk County of the body of the petitioner; also a

WRIT OF ERROR, issued on April 7, 1919, to the Chief Justice of the Superior Court upon petition of the same petitioner, directing the production of the record and proceedings in the indictment, trial, conviction and sentence of the petitioner.

In both petitions it was alleged that on April 6, 1918, the grand jurors for the county of Suffolk returned an indictment against the petitioner in two counts, the first count charging an attempted larceny from the person of one William C. Hunnemann and the second count charging an attempted larceny from the person of one Eben S. Allen; that, during the hearings of the case by the grand jury, there were present Hunnemann and Allen, certain police officers and other persons, not members of the grand jury nor persons lawfully authorized to be with the grand jury while it was hearing the case, and that the petitioner had no knowledge thereof until after his conviction and sentence; that during the trial of the indictment by a traverse jury, the petitioner alleged exceptions to the admission of evidence and to rulings and refusals to rule by the presiding judge; that the petitioner was found guilty and sentenced, and that thereafter he moved for a stay of the sentence until his exceptions were passed upon by this court and that the motion was denied.

The grounds upon which the writ of habeas corpus was asked were that the unlawful presence of persons before the grand jury rendered the indictment against the petitioner invalid, and that the denial of the petitioner's motion to stay sentence and the imposing of sentence upon him before this court had passed upon his exceptions was a denial to him of the due process of law and of the equal protection of the law to which he was entitled under art. 14 of the Amendments to the Constitution of the United States.

The errors alleged in the petition for a writ of error were, in substance, (1) that the unlawful presence of persons before the grand jury rendered the indictment against the petitioner invalid; (2) that the sentence imposed upon the petitioner "was wholly unauthorized and inconsistent with the law of this Commonwealth;" (3) that the trial of the petitioner upon the indictment, "there being two counts therein for two distinct attempts of larceny from the person, committed at different places and in no way connected, infringed upon the inalienable right of a fair and impartial trial which is guaranteed by the Constitution of the United States and of this Commonwealth to every person charged with crime;" (4) that the denial to the petitioner of a stay of sentence until this court had passed upon his exceptions was a denial to him of the right of liberty, and (5) of the due process of law and the equal protection of the law which was his right under art. 14 of the Amendments to the Constitution of the United States.

The Commonwealth filed a plea *in nullo est erratum*, in which, among other allegations, were the following:

"1. In the hearing of said case of Commonwealth v. Lebowitch *et al.* before the grand jury which returned the indictment, all witnesses, including the police officers, were in the grand jury room at the time when each of said witnesses was interrogated by an assistant district attorney, and when each gave his testimony, and that the testimony of each of the witnesses was given in the hearing and presence of the other witnesses in the case; but that none other than material witnesses in the case, a stenographer who was duly sworn as required by law, and the assistant district attorney were present at said hearing; that none of said witnesses or persons were present during the deliberations of the grand jury upon said case except that the assistant district attorney was present at said deliberations.

"2. The claim that the indictment against the petitioner was invalid by reason of the presence of persons before the grand jury was not raised in the Superior Court by motion or plea of any kind nor in any way brought to the attention of the court until after a plea of not guilty, verdict of guilty, sentence, and stay of sentence had been refused, although the Commonwealth is willing to concede, if the plaintiff in error so claims, that information

of the presence of said persons before the grand jury as above admitted did not come to the knowledge of the plaintiff in error, or his counsel, until after the defendant had been sentenced, and the motion to stay sentence had been passed upon and denied.

"3. Before the recent decision of this court in the case of *Commonwealth v. Harris*, 231 Mass. 584, it had been the long continued usage and custom in the Suffolk District of said Commonwealth and the unbroken practice for over forty years, known and acquiesced in by the justices of the Superior Court, for the grand jury, in their discretion, to permit the presence of more than one witness, including police officers when witnesses, in the grand jury room during the hearing of causes and investigations; that the exercise of this discretion by the grand jury has been found to be necessary at times to call interpreters to remain during the hearings, to confront witnesses with each other, to have witnesses make identifications in the presence of the grand jurors, and, where witnesses in custody were subpoenaed to appear before the grand jury, it has been the practice to admit the jailor or custodian in the grand jury room while testimony was being given; and that it has always been the practice in this and other districts in said Commonwealth for the district attorney or his assistants to be present and interrogate witnesses in grand jury proceedings, and also to be present and render assistance to the grand jury during their deliberations; that the admittance of persons in the grand jury room during the hearing before the grand jury in the case before this court was in accordance with this established custom."

It having been agreed in both cases that the facts were as alleged in the plea *in nullo est erratum* in the writ of error, the petition for a writ of habeas corpus was reserved for the full court by *Carroll, J.*, and the two cases were heard by this court together.

E. M. Shanley, for the petitioner.

A. C. Webber, special Assistant District Attorney, for the Commonwealth.

RUGG, C. J. 1. The main question presented on these records is whether the fact, that at the hearing before the grand jury which returned the indictment against William Lebowitch all the witnesses including police officers were present in the grand

jury room and within hearing at the time when each witness gave his testimony, can be raised after trial, verdict and sentence, in instances where this fact did not come to the knowledge of the person indicted or his counsel until after sentence.

It was decided in *Commonwealth v. Harris*, 231 Mass. 584, that a plea in abatement before a general plea of not guilty based on such facts should be sustained. That result was required by *Jones v. Robbins*, 8 Gray, 329. Those decisions are based upon the fundamental conception that proceedings before the grand jury must be in secret. In an opinion by the justices reported in 232 Mass. 601, the Senate were advised that a statute permitting police officers to be present in the grand jury room during the examination of other witnesses would be contrary to the right secured by art. 12 of the Declaration of Rights because violative of the essential secrecy of the grand jury.

The chief argument of the district attorney in the case at bar has been directed to the point that that which has been thus declared should be relaxed in favor of a looser and what may be thought more expeditious practice. The matter was carefully considered at length on these two late occasions. Decisions in other jurisdictions now called to our attention were fully examined and maturely considered before these opinions were announced. The conclusions there reached were deliberate. Renewed study of the whole subject does not lead to the result that any erroneous or mistaken view there was set forth. The evil of the contrary practice is denounced by some courts which do not hold it unlawful. *State v. Wood*, 112 Iowa, 484, 486. *Sadler v. State*, 124 Tenn. 50. *Lawrence v. Commonwealth*, 86 Va. 573, 577. While there are adjudications expressing an opinion different from that of this court, many of them arose with reference to the presence of stenographers whose aid was thought to be necessary.

The grand jury as known to the common law always has been regarded as a bulwark of individual liberty and a fundamental protection against despotism and persecution. The rule of secrecy of its hearings and deliberations has come down from early times. There is nothing new about it. Adherence to it, which has been doubtless more strict in some counties than in others in recent years, has never been commonly thought burdensome or found in practice to result in any inefficiency in the in-

quest. One purpose of the grand jury in making its investigations and accusations is to ascertain truth. Where that end in its essence cannot be achieved without the presence of more than one person, the rule that only one person may be present is not applicable. For example an interpreter must be in the grand jury room at the same time with the person ignorant of the English language. A prisoner of desperate character brought on habeas corpus to testify before the grand jury might be taken into its presence under guard. An indispensable attendant for a sick or disabled witness would not contravene the rule. Where for example a ballot box is by law in custody of one person and the key to it in that of another and the grand jury needs to examine the contents of the box, the presence of the two officials necessary to open it would not be a violation of the rule. See *Cochran v. State*, 119 Md. 539. Such instances, however, rest upon inherent necessity and not upon convenience. It is only when some imperative compulsion requires it to prevent a miscarriage of justice or an utter failure of the investigation imposed by law upon the grand jury that more than one stranger at a time may be before the grand jury. That is not a relaxation of the established and constitutional method of examination of witnesses before the grand jury but a part of it.

The reasons stated and the conclusions reached in *Commonwealth v. Harris*, 231 Mass. 584, and in *Opinion of the Justices*, 232 Mass. 601, need not be repeated. They are approved and adopted as the basis of this decision. The practice to the contrary prevailing in Suffolk County for more than forty years, as averred in the plea *in nullo est erratum*, manifestly cannot override the fundamental law.

Such an objection to an indictment as is here specified can be raised only before the general plea of guilty or not guilty. That was settled in *Commonwealth v. Tucker*, 189 Mass. 457, 463. Although the point is not discussed at length in that opinion, it was unequivocally decided. The special plea and motion to quash offered in that case after plea of not guilty but before trial, were based in substance upon irregularities the same in kind as those here relied upon. That decision is decisive against contentions of the present petitioner and plaintiff. It is sound. The matters set forth are essentially in abatement. They do not

affect the jurisdiction of the court over the crime or over the defendant. Even constitutional rights must be seasonably asserted. A general plea to the indictment admits its genuineness. It is a waiver of matters in abatement. *Commonwealth v. Wakelin*, 230 Mass. 567, 570. *Commonwealth v. Blake*, 12 Allen, 188. *Commonwealth v. Lannan*, 13 Allen, 563, 567. *State v. Carver*, 49 Maine, 588, 593. *United States v. Gale*, 109 U. S. 65. See *Cole v. Ackerman*, 7 Gray, 38, 40.

2. The defendant was convicted upon two counts joined in one indictment, each count charging him with an attempt to commit larceny from the person, the individual named in each count being different. He was sentenced for both offences to confinement in the House of Correction for thirty months. There is no error of law to the harm of the defendant in this sentence. R. L. c. 208, § 24; c. 215, § 6, cl. 2; c. 220, § 19. The reasons are elaborated in *Kelley v. Commonwealth*, 215 Mass. 209, *Lane v. Commonwealth*, 161 Mass. 120, *Commonwealth v. O'Neil*, 188 Mass. 330, *Commonwealth v. Cline*, 213 Mass. 225, and need not be repeated.

3. Although the indictment charged the defendant in successive counts with distinct offences of the same general nature committed against different persons, there was no error of law in putting him to trial upon both counts at the same time. *Commonwealth v. Mullen*, 150 Mass. 394, 397. *Commonwealth v. Rosenthal*, 211 Mass. 50. *Commonwealth v. Szczepanek*, *post*, 411.

4. The refusal of the judge to stay execution of the sentence is not subject to review in this proceeding. Sentence must be imposed upon conviction of a crime not punishable by death notwithstanding exceptions, although the execution may be stayed if the justice imposing it or a justice of the Supreme Judicial Court files a certificate, that in his opinion there is reasonable doubt whether the judgment should stand. R. L. c. 220, § 3. This statute is constitutional. The judge was not obliged to state his reasons for refusing to grant a stay. *Commonwealth v. Brown*, 167 Mass. 144, 146. No error is shown in this or any other particular.

Judgment affirmed.

Petition for writ of habeas corpus denied.

COMMONWEALTH vs. NESHAN F. BARRONIAN.

Suffolk. March 9, 1920. — March 30, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Husband and Wife. Witness, Married person. Evidence, Competency, Remoteness. Practice, Criminal, Exceptions. Pleading, Criminal, Plea. Constitutional Law, Secrecy of grand jury proceedings. Jury and Jurors.

At the trial of an indictment charging a man with perjury, it is proper to admit in evidence testimony of his wife, voluntarily given, as to statements which were made by him to her previous to their marriage and which tend to establish his guilt.

At the trial of an indictment charging that the defendant in January, 1918, falsely testified that he did not own certain real estate, evidence is admissible tending to show that shortly before July, 1917, he stated that he did own it.

At the trial of an indictment charging that the defendant in January, 1918, falsely testified that he did not own certain real estate, the defendant testified in his own behalf and, subject to his exception, was compelled to answer in cross-examination questions as to whether he had consulted a certain attorney at law with reference to disposing of his interest in the real estate and whether he had not said to the attorney that he wanted "to get rid of" his interest therein. His answer in substance was that he did not remember, and that he "did not have any interest to say such a thing." *Held*, that the exceptions must be overruled because under the circumstances the defendant had no valid ground for complaint.

An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge made against the defendant, comes too late if it is raised for the first time in the form of an offer of proof during the cross-examination of a witness for the Commonwealth at the trial following a general plea of "not guilty" to the indictment, and again is raised by a plea to the jurisdiction of the court filed nearly nine months after conviction.

INDICTMENT, found and returned on July 31, 1918, charging the defendant with perjury in that, at a hearing upon a libel for divorce brought against him by his wife, where it became and was material to the issue, whether he owned or was interested in the property situated and numbered 258 on Washington Avenue in Chelsea, he falsely testified in substance and effect that he did not own that property.

On March 13, 1919, the defendant pleaded "not guilty." The defendant was tried in the Superior Court before Aiken, C. J.

During the trial and in cross-examination of a witness for the Commonwealth, the defendant "offered to show that while this case was being heard by the grand jury one or more persons, witnesses in the case, were in the grand jury room present while other witnesses were testifying." The evidence was excluded, subject to an exception by the defendant.

The testimony of the defendant, relied upon by the Commonwealth as constituting perjury, was given on January 4, 1918, and was as follows:

Q. "You own a house in Chelsea?" A. "No, sir." — Q. "You don't?" A. "No, sir." — Q. "Did n't you own one there?" A. "I just simply let them use my name for a little while." — Q. "Whose name was it in?" A. "What?" — Q. "The house in Chelsea?" A. "I said I let them use my name." — Q. "Is it in your name?" A. "No, sir." — Q. "When did you transfer it?" A. "May the first." — Q. "This last year?" A. "Yes." — Q. "To whom did you transfer it?" A. "Oscar Garabedian." — Q. "So that you own no property in Chelsea, nor anywhere?" A. "No, sir." — Q. "Of any kind or description?" A. "No."

The testimony of the defendant on cross-examination, relating to his conversation with an attorney at law, referred to in the opinion, was as follows: Q. "Did you consult Mr. Fitzgerald [an attorney at law] with reference to the question of disposing of your interest in this house in Chelsea, yes or no?" A. "Well, I cannot say, my dear man, I don't remember. You cannot ask me to say yes or no, because I don't remember. Maybe yes, maybe no." — Q. "Then your memory on that question does not serve you now?" A. "No, that is true." — Q. "See if I can refresh your memory. Did you go to Mr. Fitzgerald's office with Manoogian?" A. "I don't remember that." — Q. "Did you go to Fitzgerald's office with Manoogian and say to Fitzgerald, 'I want to get rid of my interest in the house in Chelsea?'" A. "I did not have any interest to say such a thing." — Q. "Did you say that, yes or no?" A. "I cannot say it, no." — Q. "Did you say that to Fitzgerald then, yes or no?" A. "I said I am going to answer this question, not you, sir. My answer is this, I did not have interest to say that I have interest that I would get rid of some of that interest. That is answer enough for you."

Other material evidence at the trial is described in the opinion.

The defendant was found guilty on March 18, 1919; and alleged exceptions.

On December 9, 1919, and on February 5, 1920, the defendant filed pleas "to the jurisdiction of the court," alleging that unauthorized persons were present with the jury when they were hearing the evidence as to the charge against the defendant, and that therefore the indictment was not legally found. The Commonwealth demurred to the pleas on the ground that they were not filed seasonably.

The demurrer was sustained by *Aiken*, C. J., to which ruling the defendant filed a second bill of exceptions.

F. L. Norton, for the defendant.

W. S. Kinney, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. The defendant was indicted for perjury committed in the trial of an issue joined on a libel of divorce in which he was libellee in that, it being material whether he owned or was interested in certain real estate in Chelsea, he testified wilfully, corruptly, and with knowledge of its falsity, that he did not own such property. At the trial upon the indictment there was evidence tending to show that the defendant testified at the trial of the divorce libel that he did not own the Chelsea property. Thereupon the wife of the defendant, called as a witness by the district attorney, was permitted to testify subject to exception that shortly before their marriage in July, 1917, the defendant told her that he owned the Chelsea property.

There was no error in permitting the wife to testify respecting conversations with her husband before her marriage. Although she could not be compelled to testify against her will, she nevertheless was a competent witness and might give evidence if she chose. R. L. c. 175, § 20.

The principle always has been enforced by this court that neither a husband nor a wife shall testify as to private conversations. *Sampson v. Sampson*, 223 Mass. 451, 458. Private conversations in this sense can occur only during the existence of marriage. Neither the reason nor the letter of that rule applies to conversations held before marriage. Such conversations are not excluded from being offered as evidence in court.

The conversation here in question was near enough in point of time to be pertinent and was material to the issue.

The defendant offered himself as a witness and subject to his exception was asked on cross-examination whether he had consulted a certain attorney at law with reference to disposing of his interest in the Chelsea property and whether he had not said to the attorney that he wanted "to get rid of" his interest in the Chelsea property. It is doubtful whether, in view of the answers made by the defendant, he suffered any injury by the examination. Under the circumstances here disclosed, the defendant has no valid ground for complaint. See, in this connection, *Woburn v. Henshaw*, 101 Mass. 193, 200; *McCooe v. Dighton, Somerset & Swansea Street Railway*, 173 Mass. 117; *Blount v. Kimpton*, 155 Mass. 378; *Jones v. State*, 65 Miss. 179, 183, 184; *State v. Tall*, 43 Minn. 273, 276; Wigmore on Evidence, §§ 2292, 2327.

It was too late for the defendant to raise, during or after trial, the point that the examination of witnesses before the grand jury occurred in the presence of bystanders. *Lebowitch, petitioner, ante*, 357.

Each bill of exceptions overruled.

HELEN M. DUNHAM vs. FREDERICK A. DODGE & others.

Suffolk. March 1, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Way, Private. *Easement*, Right of way. *Equity Pleading and Practice*, Bill, Decree.

The owner of farm land bounding northerly on a public way and westerly on another farm, who was entitled to a right of way over a lane thirteen feet wide, running northerly along his westerly boundary to the public way and enclosed on its easterly and westerly sides by fences, and also to another right of way over the adjoining farm running to the public way and parallel to the enclosed lane but not expressly located by deed nor defined as to its width although shown on the surface of the ground by cart ruts, constructed a gate at the southwesterly corner of his land in the fence which was the easterly boundary of the first lane. Opposite that gate, the owner of the adjoining land constructed a bar-way in the fence which was the westerly boundary of the first lane and thus gave access across the first lane to and from the second lane. *Held*, that these acts warranted the inference that both of the adjoining owners understood and

mutually agreed that the way should be located at the place shown by the gate and the barway.

Where a right of way from a farm across an adjoining farm to and from a public way was given by deed without limitation or reservation and the width of the way was not defined, the easement was to the use of a way of reasonable width; and, in determining what is a reasonable width, the character and configuration of the land, the purposes for which the land and the way were used at the time of the grant, and all the circumstances attending the grant are to be considered.

Where the farms of two adjoining owners were bounded northerly on a public way and the owner of the easterly farm was entitled to a right of way, created by deed in 1887 without limitation or restriction, over the westerly farm and defined by conduct of the owners on the surface of the land as running over land which sloped sharply toward the east, southerly from the public way and parallel to the westerly boundary of the first farm to a point opposite its south-westerly corner, then turning nearly at a right angle and running easterly across a lane to that farm, a barway ten and eighteen one hundredths feet in width, erected by the owner of the westerly farm to give access to and from the way, properly may be found, in a suit to enjoin its maintenance as an obstruction to the right of way, not to be of sufficient width.

Although, in a suit in equity to enjoin the maintenance by the defendant of a barway only ten and eighteen one hundredths feet wide in a fence at the point where the plaintiff had access to a right of way to which he was entitled over land of the defendant, the prayers of the bill do not specifically include a request that a proper minimum width for the barway be determined, if, upon evidence warranting it, a finding is made by the trial judge that the width of the way should not be less than fifteen feet, it is proper to include in the final decree an order that the opening in the defendant's fence should not be less than that width.

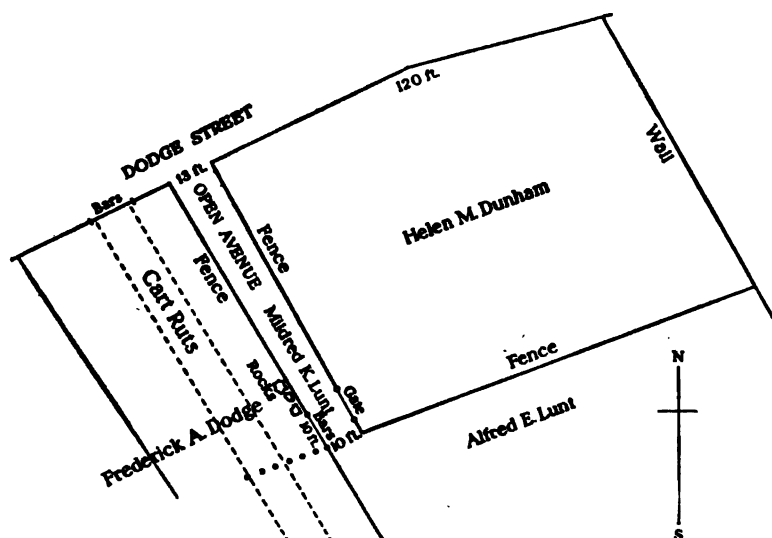
BILL IN EQUITY, filed in the Superior Court on May 27, 1919, against Frederick A. Dodge, Isabelle J. Dodge, Mildred K. Lunt, and Alfred E. Lunt, seeking to enjoin the defendants from obstructing the right of way described in the opinion.

The suit was heard in the Superior Court by Fox, J., a commissioner having been appointed under Equity Rule 35 to take the testimony. The material evidence is described in the opinion. The plan there referred to, with some variation of details illustrating facts material to the decision of this suit, is shown on page 369.

The judge filed a memorandum, stating, "The plaintiff's right of way over Dodge's land has been improperly obstructed, and she is entitled to a decree against them. The bill as to the defendants Lunt is to be dismissed."

By order of the judge, a final decree was entered, "that the rocks and the fence referred to in the plaintiff's bill unreasonably obstruct the plaintiff's right of way over Dodge's land, and the

defendants Dodge are required to remove them forthwith, except that the defendants may maintain a fence on the dividing line between the land of Lunt and the land of Dodge, with an opening not less than fifteen feet in width at a place opposite the plaintiff's gate, and close said opening with a gate or an easily removable set of bars, whenever said opening needs to be closed for the proper



uses of their land. The rocks are to be removed from their present position so that they will not obstruct a way fifteen feet in width, curving with an easy turn from the opening aforesaid northerly into the cow lane or farm road now upon said Dodge's land, running to Dodge Street."

The defendant Frederick A. Dodge appealed.

S. Perley, (*A. E. Lunt* with him,) for the defendant Frederick A. Dodge.

E. E. Gordon, for the plaintiff.

CROSBY, J. By deed dated August 13, 1887, Andrew Dodge (father of the defendant Frederick A. Dodge) conveyed to Charles K. Ober a portion of his farm comprising the tracts now belonging to the plaintiff and the defendants Lunt, with a frontage of one hundred and thirty-three feet on Dodge Street in Beverly "together with a right of way to pass and repass, to and from said granted premises, over my own land, on the westerly side thereof." The parties to this conveyance erected a fence along the boundary

line between their respective tracts. In the year 1888 Ober conveyed to one Carr a lot eighty-nine feet deep and having a frontage of one hundred and twenty feet on Dodge Street "together with an open right of way over my strip of land adjoining lot conveyed in this deed to the west, and including also a right of way over land of Andrew Dodge on the west of the before mentioned strip of land belonging to me." The land so conveyed by Ober to Carr is now owned by the plaintiff. The defendant Dodge is the owner of the remainder of the farm not conveyed as above described by Andrew Dodge to Ober.

The land of the plaintiff has been duly registered by decree of the Land Court, dated May 16, 1919, which recites that "There is appurtenant to the above described land an open right of way to pass and repass for all purposes between the above described land and Dodge Street over a strip of land marked 'Mildred K. Lunt' shown as a right of way on said plan, in common with others entitled thereto; and also a right of way over land now or formerly of Frederick A. Dodge et al., as shown on said plan, as described in a deed given by Andrew Dodge to Charles K. Ober, dated August 13, 1887, duly recorded, . . . in common with others entitled thereto." It thus appears that there is appurtenant to the land of the plaintiff an open right of way thirteen feet wide, over land of Mildred K. Lunt adjoining the plaintiff's land on the westerly side thereof, which runs from Dodge Street in a southerly direction past the plaintiff's land; and also a right of way over land of the defendant Dodge adjoining and westerly of the way over the land of Mildred K. Lunt. Running through the Dodge farm to the south from Dodge Street is an elevation sometimes called Indian Ridge over which runs the Dodge lane. This lane was used by the owners of the Dodge farm as a cow lane, and cart ruts are visible on the surface of the ground. There is a stone wall on the westerly side and a fence along the easterly boundary; the land slopes abruptly away from the ridge, along the top of which is the travelled part of the lane. When Dodge Street was relocated about the year 1875 it was about six feet below the level of the lane and the latter was levelled off making it accessible from the street.

The bill as to the defendants Lunt having been ordered dismissed, the case is before us on appeal from the final decree of the defendant

Frederick A. Dodge. No question is raised as to the right of the plaintiff to pass over the cow lane, so called, on the Dodge land to a point nearly opposite the southwest corner of her own land, and across the thirteen-foot strip to her own land, the only issue being as to the width of the opening in the boundary fence between land of Dodge and Lunt. The defendant Dodge has erected a barway in the fence with two posts set ten and eighteen one hundredths feet apart, which he contends is a reasonable width, to be used by the plaintiff in the exercise of the easement. He has deposited three large rocks along the boundary line close to the northerly barpost and also has set a row of posts in the ground across the cow lane at a point about opposite the southerly barpost. These obstructions prevent large automobile trucks from using an opening greater than ten and eighteen one hundredths feet wide in passing to and from the plaintiff's land.

The plaintiff contended and offered evidence tending to show that the narrowness of the barway makes it impossible for large coal trucks to pass to and from her premises over the right of way, and that an opening at least fifteen feet in width is necessary for a reasonable use of the way. The width of the right of way over the Dodge land is not described in the deed creating it, nor is it defined in the decree of the Land Court. It is settled, however, that where a right of way is granted without fixing its location but there is a way already located at the time of the grant, such way is held to be the location of the way granted. *O'Brien v. Schayer*, 124 Mass. 211. *Gerrish v. Shattuck*, 128 Mass. 571. If the grant creating a right of way does not define its location, the owners of the dominant and servient estates may expressly agree upon such location or by conduct may be found to have impliedly agreed to the location. The plaintiff built a gate in her fence near the southwest corner of her lot, and the defendant placed the barway in the boundary fence between his land and the thirteen-foot strip at a place substantially opposite her gateway. These acts warrant the inference that both parties understood and mutually agreed that the way should be located on the surface of the ground at that place. *Bannon v. Angier*, 2 Allen, 128. *George v. Cox*, 114 Mass. 382.

The plaintiff in the exercise of her right to use the way was limited to such use as was reasonably necessary. In determining what is a reasonable width of the barway for the use of the plain-

tiff reference must be had to what was presumed to have been in the minds of the parties at the time of the grant. The plaintiff is not entitled to a way of greater width than was reasonable at the time of the grant because of changed conditions. *Johnson v. Kinnicutt*, 2 Cush. 153. *Atkins v. Bordman*, 2 Met. 457, 467, 468. A grant of a way over one's own land without limitation or restriction is understood to be a general way for all purposes, but is limited to the nature and condition of the subject matter at the time of the grant and the obvious purposes which the parties had in mind in making it. *Rowell v. Doggett*, 143 Mass. 483. As the width of the way is not specified and as it is not limited to any particular purposes, the question is, what is a reasonable width for the owner of the dominant estate to use in passing to and from the cow lane to her land. In determining this question, the situation of the parties, the character and configuration of the land, the purposes for which it was then used, and all the circumstances are to be considered.

It is plain that at the time of the grant in 1887 and previously the entire tract had been devoted to farming purposes, which would include the tilling of the soil and the raising of crops, and it well might be inferred that it was intended by the parties that a reasonable use of the way contemplated the passage of teams with heavy loads, such as hay and other farm produce, which would require a space wider than would be necessary for lighter and smaller vehicles. There was evidence that the cow lane over the Dodge land extended from the street in a southerly direction over land which sloped off sharply toward the west, and that at a point opposite the barway erected by the defendant the width of the way that could be used for the purposes of travel was limited to twelve feet and teams passing through the barway in either direction would be obliged to turn nearly at right angles. Manifestly the way must be of such width as to be of practical use to the plaintiff. What would be sufficient for a heavily loaded team travelling along a straight line might not be in case of a way with sharp angles and curves, as more room would be required in turning angles than in passing in a straight line. *Walker v. Pierce*, 38 Vt. 94.

We are of opinion that under existing conditions it cannot be said that the trial judge erred in finding that the plaintiff's right

of way was improperly obstructed by reason of the fence and rocks. Whether a suitable and convenient use of the way in view of the narrowness of the cow lane opposite the barway required an opening in the fence not less than fifteen feet in width, was a question of fact, and the finding of the trial judge cannot be said to be plainly wrong. *O'Linda v. Lothrop*, 21 Pick. 292. *Atkins v. Bordman*, *supra*. *Underwood v. Carney*, 1 Cush. 285. *Johnson v. Kinnicutt*, *supra*. *Crosier v. Shack*, 213 Mass. 253.

The defendant as the owner of the servient estate was entitled to fence the sides of the way if necessary for his own protection, and could erect and maintain at his own expense a suitable barway in the fence. He was not required to erect a gate at that point but could maintain either a barway or gate, and the decree so provides. *Ball v. Allen*, 216 Mass. 469. No valid objection to the maintenance of the bill can be sustained because it prays for injunctive relief and does not seek to establish the width of the way. The plaintiff was entitled to a suitable and convenient means of passing between her premises and Dodge Street, and the decree respecting the width of the barway is merely incidental to the relief prayed for. *Johnson v. Kinnicutt*, *supra*. *Tudor Ice Co. v. Cunningham*, 8 Allen, 139. *George v. Cox*, *supra*. *Stetson v. Curtis*, 119 Mass. 266. *Lipsky v. Heller*, 199 Mass. 310, 318.

Decree affirmed.

JAMES ELGAR, INCORPORATED, vs. CHARLES A. NEWHALL.

Suffolk. March 1, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, Building contract. *Waiver*. *Practice*, Civil, Requests and rulings, Finding by trial judge.

Where an action by a building contractor upon a contract in writing for the construction of a building for the defendant was heard by a judge without a jury upon an auditor's report and evidence both oral and documentary and the judge found that a requirement of the contract, that final payment should be made only upon certificate of the architect, was waived by the parties and found for the plaintiff, refusing to grant rulings, asked for by the defendant, that on all the evidence he should find for the defendant, that there was no evidence of any waiver of the contract by either party, and that the plaintiff, having failed to furnish an architect's certificate that the contract had been completed, could

not recover, exceptions by the defendant which do not include a report of all the evidence must be overruled.

At the hearing of the action above described, the defendant contended that certain mahogany furnished by the plaintiff did not satisfy the requirements of samples furnished by the plaintiff, and the judge so found; but he also found that the defects in the mahogany were remedied to the satisfaction of the defendant, and refused to grant a request by the defendant for a ruling that, because the mahogany was not in accordance with the sample, the plaintiff could not recover, and the defendant alleged exceptions. *Held*, that, in the absence of a report of all the evidence, the exceptions must be overruled.

At the hearing of the action above described, the defendant asked for a ruling that, the plaintiff having admitted that he did not furnish material according to sample, the burden was on him to show that the defendant had not been damaged. The judge stated that he adopted the ruling requested in the sense that the burden was on the plaintiff to show that he substantially completed the contract. *Held*, that the manner in which the request was dealt with was correct.

At the hearing of the action above described, it appeared that there was a delay in the completion of the contract beyond the time permitted by its provisions, and the judge found that it did not appear that the delay was due to any failure on the plaintiff's part to figure the size and "determination" of material from the plan and specifications, and refused to give a ruling, asked for by the defendant, that the defendant was "not liable for any delays occasioned by the plaintiff in its factory, as the size and determination of all material could have been figured from the plan and specifications." *Held*, that the refusal of the ruling was proper.

A judge hearing an action without a jury is not required to grant a request for a finding of fact.

At the hearing of the case above described, it appeared that specifications, which were a part of the contract, required that the building should be ready for occupancy by October 1; that the contract required that, if the plaintiff was delayed by conduct of the defendant, of his architect, or of any other contractor employed by the defendant on the work, the time for completion should be extended accordingly but not unless the plaintiff should make claim to the architect therefor within forty-eight hours after the delay; that the defendant should furnish all labor and material essential to the conduct of the work not included in the contract with the plaintiff and that, in the event of failure by him so to do resulting in loss to the plaintiff, he would reimburse the plaintiff for such loss. The judge found that the provision of the contract relating to the presentation by the plaintiff to the architect of a claim for an extension of time was waived by the parties, and that the defendant did not so furnish all labor and materials essential to the conduct of the plaintiff's work as not to delay its progress, and assessed damages therefor. The defendant asked for a ruling that, "The contract being silent as to the length of time in which the work covered by the contract was to be completed, the plaintiff cannot recover damages on account of delay caused by other contractors." The request was refused, and the defendant excepted. *Held*, that the exception to the refusal to rule as requested must be overruled.

CONTRACT, with a declaration in three counts, the first and the third counts setting forth breaches by the defendant of a contract

in writing whereby the plaintiff agreed to construct for the defendant an apartment building at the corner of Beacon Street and Hawes Street in Brookline; and the second count being upon an account annexed relating to the construction of the same building. Writ dated April 10, 1916.

The action was referred to an auditor and afterwards was heard by *McLaughlin, J.*, without a jury, upon the auditor's report and other evidence, oral and documentary. Material evidence is described in the opinion.

At the close of the evidence, the defendant presented the following, entitled "Requests for Findings of Fact":

"1. The contract being silent as to the length of time in which the work covered by the contract was to be completed, the plaintiff cannot recover damages on account of delay caused by other contractors.

"2. That no certificate was granted by the architect as provided by the terms of the contract.

"3. The evidence does not warrant a finding that there was any waiver of the requirement of the contract that the certificate of the architect should be furnished.

"4. The defendant [plaintiff] was bound to determine for itself the measurements and requirements for the material to finish said building from the contract and specifications.

"5. The defendant [plaintiff] having furnished samples of the mahogany to be used in the work was bound to furnish the material corresponding to samples."

The defendant also presented the following, entitled "Requests for Rulings of Law":

"1. On all the evidence, the plaintiff cannot recover.

"2. There is no sufficient evidence of any waiver of the contract by either party thereto.

"3. The plaintiff having failed to furnish an architect's certificate that the contract had been completed cannot recover.

"4. The plaintiff having sold the material by sample, and not having furnished material in accordance with the sample, cannot recover.

"5. The plaintiff having admitted that he [it] did not furnish material according to sample, the burden is on the plaintiff to show that the defendant has not been damaged.

"6. The defendant is not liable for any delays occasioned by the plaintiff in its factory, as the size and determination of all material could have been figured from the plans and specifications."

The disposition made of these requests by the judge is described in the opinion.

The judge found for the plaintiff in the sum of \$5,824.86; and the defendant alleged exceptions.

The case was submitted on briefs.

S. M. Child, for the defendant.

V. C. Loring, for the plaintiff.

CROSBY, J. This is an action to recover a balance of \$4,025 for the furnishing of all materials and labor used in the construction of an apartment house, in accordance with certain drawings and specifications which are a part of the written contract. The declaration also contains a count for damages because of delay and additional expense alleged to have been incurred by the defendant. No question of pleadings is raised. The case was heard by a judge of the Superior Court on an auditor's report and on oral testimony and exhibits introduced at the trial. All of the testimony before that court is not reported.

The specifications provide that the building should be completed by October 1, 1915. The cost for the entire work was \$35,000, subject to additions and deductions provided for in the contract, and such sum was to be paid only upon certificates of the architect (Article 9). It also was provided (in Article 10) that no certificate given nor payment made except the final certificate or final payment should be conclusive evidence of the performance of the contract. The auditor and the judge found that no final certificate had been issued by the architect; for that reason the defendant contends that the action cannot be maintained. The judge found for the plaintiff and the case is before us on his refusal to make certain rulings of law and findings of fact requested by the defendant.

He ruled that the plaintiff could not recover upon the contract as originally made for the reason that he never obtained a final certificate of the architect as provided in articles 9 and 10. He found, however, that this provision of the contract was waived, and accordingly ruled that the inability of the plaintiff to procure the final certificate was not a bar to recovery. The ruling was

correct. *Bowen v. Kimbell*, 203 Mass. 364. *Handy v. Bliss*, 204 Mass. 513. *Gilman & Son, Inc. v. Turner Tanning Machinery Co.* 232 Mass. 573, 575. In view of the finding so made the defendant's first, second and third requests were rightly refused.

The fourth and fifth requests relate to the duty of the plaintiff under the contract to furnish certain mahogany trimming, samples of which were delivered to the defendant. There was a finding that the mahogany so furnished was not in accordance with the samples, but it was also found that the defects therein were remedied to the satisfaction of the defendant; in view of the latter finding the fourth request could not properly have been made. The judge stated that he adopted the fifth in the sense that the burden was on the plaintiff to show that he substantially completed his contract; the manner in which this request was dealt with was correct and the exception must be overruled. It was found that it did not appear that the delay in the completion of the contract was due to any failure on the plaintiff's part to figure the size and "determination" of material from the plans and specifications; accordingly the sixth request was properly refused.

The defendant also presented certain requests entitled "Requests for Findings of Fact." The trial judge was not required to make findings of fact at the request of either party. Some of these requests were in fact requests for rulings of law and as such were so considered by the court. The first related to the finding by the auditor in favor of the plaintiff of substantial damages because of delay on the part of other contractors, which retarded the progress of the work of the plaintiff. While the specifications which are deemed a part of the contract provide that the building should be ready for occupation by October 1, 1915, it is also stipulated in Article 7 in substance that if the contractor should be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, architect, or of any other contractor employed by the owner on the work, the time fixed for the completion should be extended for a period equivalent to the time lost by reason of such cause; and no such allowance should be made unless a claim was made to the architect within forty-eight hours of the occurrence of the delay. Article 8 provides in substance that the owner agrees to provide all labor

and materials essential to the conduct of the work not included in the contract of the plaintiff, in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the contractor, agrees to reimburse the latter for such loss. The judge found on the auditor's report and on all the evidence that the provisions of Article 7, relating to presenting to the architect claims for an extension of the time and that he shall determine and fix such extension, were waived by the parties; and also, that the defendant did not provide the labor and materials essential to the conduct of the plaintiff's work in such manner as not to delay its progress, and that the consequent loss to the plaintiff amounted to \$2,500.

The requests entitled "Requests for Findings of Fact" are considered by us so far as they present questions of law. The first is in fact a request for a ruling of law, and in view of the findings of fact was rightly refused. The second, although a request for a finding of fact, was adopted by the court. The third was properly refused, as all the evidence on the question of the waiver of the requirement that a certificate of the architect should be furnished, is not before us. The fourth and fifth were requests for rulings of law and were made by the judge. As no error of law appears in the manner in which the requests were dealt with, the entry must be

Exceptions overruled.



MORRIS BERGMAN vs. CHARLES I. GRANSTEIN.

Plymouth. March 1, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Payment. Bills and Notes.

A post-dated check, given by a merchant to the seller of certain goods, with a statement of a further balance due, in order to gain possession of the goods, which were being held by a carrier under orders of the seller until a sight draft for the purchase price was paid, is not as a matter of law a payment, and, upon the check not being paid, the seller may bring an action for the price of the goods sold and need not sue upon the check as a promissory note.

An instrument, given by a purchaser of goods to the seller with two post-dated

checks and reciting that the seller had received \$1,000 from the purchaser "on account. Balance to be paid in sixty days. Total \$2000 70/100; balance \$1000 70/100," is not a promissory note.

CONTRACT upon an account annexed for \$1,478.20. Writ dated February 11, 1919.

In the Superior Court the action was tried before *McLaughlin, J.* The material evidence is described in the opinion. At the close of the evidence, the defendant asked for the following rulings among others:

"3. If the jury find that the plaintiff accepted two post-dated checks signed by the defendant, then such checks would constitute notes, and acceptance of such checks, or notes, would be payment, and the plaintiff would have to sue on these checks or notes, and not on his original right of action.

"4. The receipt, so called, signed by Nathan Shimilovich, is a note, and given to the plaintiff would be payment, and the plaintiff must sue on such note, and not on his original claim."

The rulings were refused. There was a verdict for the plaintiff in the sum of \$1,501.45; and the defendant alleged exceptions.

The case was submitted on briefs.

H. C. Thorndike, for the defendant.

H. F. Parker, for the plaintiff.

CROSBY, J. This is an action for goods sold and delivered to the Brockton Furniture Exchange, which, it could have been found, was owned by the defendant and carried on by him in Brockton.

The goods were ordered in New York and shipped by rail to Brockton. A bill of lading with sight draft attached was sent to a bank for collection. There was evidence that one "Shimilovich was either agent or partner of the defendant and that he acted as manager for the defendant." There was further evidence that on the arrival of the goods Shimilovich did not have money enough to pay the draft, and asked the defendant to do so; that the defendant stated he could not pay it; that the plaintiff was notified and sent one Frank to Brockton as his agent; that Frank told Shimilovich he had no authority to release the goods until they were paid for; that afterwards the defendant made two post-dated checks, for \$400 and \$600 respectively, payable to the plaintiff, and delivered them to Frank; that at the same time an instrument

written by Shimilovich was delivered to Frank, which the defendant contends is a note. The instrument recites in substance that \$1,000 has been received from the Brockton Furniture Company "on account, Balance to be paid in sixty days. Total \$2000 70/100; balance \$1000 70/100." Upon delivery of the checks and instrument above referred to the goods were delivered to the defendant. The check for \$400 was paid by the defendant on presentation. Payment of the \$600 check was stopped by the defendant, and the check was protested for non-payment.

The acceptance by the plaintiff of the checks was not as matter of law a payment, as there is no evidence to show they were accepted in payment; accordingly, the defendant's third request was properly refused. *Taylor v. Wilson*, 11 Met. 44, 51. *Illustrated Card & Novelty Co. v. Dolan*, 208 Mass. 53. *Brown v. Hannagan*, 210 Mass. 246. *Keystone Grape Co. v. Hustis*, 232 Mass. 162, 165.

The judge rightly refused to rule that the instrument given to the plaintiff's agent at the time of the delivery of the checks was a note; it is not signed by the defendant nor payable to the plaintiff, and lacks most of the requirements of a promissory note; it plainly appears to be a receipt in ordinary form for \$1,000 on account, with a statement of the balance due and of the time when according to the terms of sale it is to be paid. The defendant's fourth request was rightly refused.

Exceptions overruled.

BENFORD MANUFACTURING COMPANY vs. STANDARD TIRE AND RUBBER COMPANY.

Suffolk. March 2, 3, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings.

An order in writing for goods, signed by the purchaser and containing provisions that no goods should be returned without permission of the seller, that no agreements other than those written on the order would be recognized and that verbal agreements with the salesman would not be recognized, is complete

and free from ambiguity; and if, in an action by the seller against the purchaser for the price of such goods, the defendant admits their receipt and that the price stated is correct, a verdict may be ordered for the plaintiff although it appears that, at the time of the signing of the order, the defendant and a salesman for the plaintiff had some conversation which led the salesman to make a memorandum on the order requesting the plaintiff to advise the defendant whether an exchange of certain goods, that formerly had been purchased of the plaintiff and then were held by the defendant in his store, could be made for the goods described in the order.

CONTRACT upon an account annexed for \$412.50 for automobile spark plugs and timers sold by the plaintiff to the defendant. Writ in the Municipal Court of the City of Boston dated August 7, 1918.

Upon removal to the Superior Court, the action was tried before Fox, J. The material evidence is described in the opinion. At the close of the evidence, by order of the judge upon motion by the plaintiff, a verdict was entered for the plaintiff in the amount of his claim; and the defendant alleged exceptions.

J. E. Crowley, for the defendant.

H. N. Guterman, for the plaintiff.

CROSBY, J. This is an action to recover upon an account annexed for automobile spark plugs sold and delivered by the plaintiff to the defendant. At the close of the evidence, on motion of the plaintiff, the trial judge ordered the jury to return a verdict for the plaintiff for the full amount named in the declaration. To that order the defendant excepted.

At the trial the defendant admitted the receipt of the goods and that the market price was as stated in the account annexed. The goods were sold in accordance with a written order signed by the defendant, which contains among other provisions the following:

"Returns: No goods to be returned without permission of the Benford Manufacturing Company."

"No agreements other than those written on this order will be recognized.

"Verbal agreements with salesman will not be recognized."

The defendant contended and offered evidence to show that when it first began making purchases from the plaintiff the salesman of the latter told the defendant's purchasing agent that if any automobile plugs purchased were not salable the plaintiff would accept them for sizes that were salable. There was evidence that

when the goods in question were ordered the defendant's president, Cronin, had a conversation with the plaintiff's salesman respecting the return of some plugs previously purchased which were claimed by Cronin to be unsalable, and the salesman then stated that he had no authority to accept the plugs, and that it would be entirely within the power of the plaintiff to give such authority; and that a memorandum was made on the order blank for the plaintiff to advise the defendant whether or not the exchange could be made, as follows: "Look up letter about replacing long plugs. Want to return 100 1/2 1-100 7/8-200 Oakland for 400 1/2 regular Golden Giants." The defendant contended at the trial that it had returned the plugs mentioned in the memorandum and was entitled to be credited therefor.

The contract for the sale of the goods described in the written order was complete and free from ambiguity, and evidence was not admissible to vary or control its terms. No question is presented by the contract as to whether the price to be paid for the goods was all to be paid in money or part in money and part in other goods; it does not authorize the defendant to exchange plugs previously bought for those described in the order, whatever may have been the earlier, oral agreement of the parties. The written contract must be construed as requiring the defendant to pay for the goods ordered in cash, in accordance with its terms. It is not contended that the contract is unlawful or that the defendant is not bound thereby: it follows that it cannot be varied or modified by any oral agreement previously made by the plaintiff's salesman, or by what was said when it was entered into. *Barrie v. Quinby*, 206 Mass. 259. *Puffer Manuf. Co. v. Krum*, 210 Mass. 211. *Friedman v. Pierce*, 210 Mass. 419. *Loomer v. Harlow*, 214 Mass. 415. *MacAlman v. Gleason*, 228 Mass. 454.

As the plaintiff on all the evidence was entitled as matter of law to recover the full amount declared on, the order of the trial judge ordering a verdict for that amount was without error.

Exceptions overruled.

COMMONWEALTH vs. ABRAHAM W. MEKELBURG.

Suffolk. March 8, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Bastardy. Pleading, Criminal, Indictment. Superior Court. Words, "May."

The Superior Court has jurisdiction under St. 1913, c. 563, § 1, to proceed by indictment against one who gets a woman with child, not being her husband.

INDICTMENT, found and returned on April 11, 1918, charging the defendant with getting a woman with child, not being her husband.

In the Superior Court the defendant moved that the indictment be quashed on the following grounds:

"1. That the alleged offence is not the subject of indictment.

"2. That proceedings for the alleged offence can be prosecuted only upon a complaint in the municipal, district or police court, having jurisdiction in the place where the defendant lives, and if there be no such court having jurisdiction, in the place where the mother of the illegitimate child lives."

The motion was heard by *J. F. Brown, J.*, and was overruled; and, being of the opinion that the question raised by it ought to be determined by this court before further proceedings, the judge, with the consent of the defendant, reported the case for determination.

St. 1913, c. 563, § 1, reads as follows: "Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor. Proceedings under any section of this act may be begun in the municipal, district or police court having jurisdiction in the place where the defendant lives, and if there be no such court, then in any municipal, district or police court in the county; or in the municipal, district or police court having jurisdiction in the place where the mother of the illegitimate child lives; and if there be no such court, then in any municipal, district or police court in the county. If no court has jurisdiction as aforesaid, proceedings may be begun before a trial justice in the county where such defendant or such mother lives."

The case was submitted on briefs.

H. P. Fielding, Assistant District Attorney, for the Commonwealth.

G. E. Roewer, Jr., & J. Bearak, for the defendant.

CROSBY, J. The defendant was indicted in one count, under St. 1913, c. 563, § 1, charging that on November 10, 1917, not being the husband of a woman therein named, he did get her with child. He filed a motion to quash on the ground that the alleged offence is not subject to indictment, and that proceedings under the statute can be prosecuted upon a complaint only in a municipal, district or police court having jurisdiction in the place where the defendant lives, and if there be no such court having jurisdiction, in the place where the mother of the illegitimate child lives.

The first sentence of § 1 provides that "Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor." R. L. c. 215, § 1, provides that "A crime which is punishable by death or imprisonment in the State prison is a felony. All other crimes are misdemeanors." The act described in the statute is thereby made a criminal offence; proceedings of this nature previously were regarded as being civil rather than criminal proceedings. R. L. c. 82, § 22. *Corcoran v. Higgins*, 194 Mass. 291. The question is, does the statute limit proceedings thereunder exclusively to those begun in the municipal, district or police courts, or before trial justices.

As the proceedings may be brought in the courts referred to in § 1, it is obvious that the jurisdiction of the Superior Court is not expressly excluded. Although the word "may" in statutory construction is sometimes used as a synonym for "shall" or "must," still the ordinary signification of the word is that it is permissive and not mandatory. *Commonwealth v. Haynes*, 107 Mass. 194, 197. *Commonwealth v. Chance*, 174 Mass. 245, 247. In the construction of statutes the rule seems to be that the word "may" means "must" or "shall" only in cases where the public interest is concerned, or where the public or third persons have a claim *de jure* that the power should be exercised. *Hampden Trust Co. v. Leary*, 186 Mass. 577. *Cheney v. Coughlin*, 201 Mass. 204, 211, 212. *Williams v. People*, 24 N. Y. 405, 409. *Medbury v. Swan*, 46 N. Y. 200. *State v. Sweetser*, 53 Maine, 438. *Continental*

National Bank v. Folsom, 78 Ga. 449, 456. *Fresno National Bank v. Superior Court of San Joaquin County*, 83 Cal. 491. The interpretation to be placed upon the statute is to be determined from its apparent intention as gathered from the context as well as from the language of the particular provision. So interpreted we see no valid reason for holding that it should not be regarded as permissive in accordance with the general rule.

The defendant relies on the cases of *Commonwealth v. Fahey*, 5 Cush. 408, and *Commonwealth v. Smith*, 111 Mass. 407, in support of his contention. In *Commonwealth v. Fahey*, a complaint was made by a police officer to recover a penalty imposed by a by-law of the city of Boston for burying a dead body illegally. The defendant contended that under St. 1849, c. 211, § 7, the complaint should have been made by the city treasurer. The statute provided that "All fines and forfeitures . . . shall enure to the use of such town or city; and may be recovered by complaint, in the name of the treasurer . . ." It was held that such fines and forfeitures were recoverable by complaint in the name of the treasurer only. In *Commonwealth v. Smith*, a complaint was made by a constable of the city of Boston against the defendant for a violation of Gen. Sts. c. 26, § 47, relating to the public health. It was provided by Gen. Sts. c. 19, § 15, as amended by St. 1870, c. 227, that "The city marshal or other police officer, or the city treasurer, may prosecute for all fines and forfeitures which may inure to the city." The court held on the authority of *Commonwealth v. Fahey*, *supra*, that as a constable was not a police officer the complaint must be dismissed. In *Commonwealth v. Haynes*, 107 Mass. 194, the defendant was indicted under St. 1868, c. 263, § 1, for selling adulterated milk knowing it to be adulterated; the penalty for the first offence was \$100, and by § 2 "may be recovered on complaint before any court of competent jurisdiction." The defendant contended that the word "complaint" was technical and that the language of the statute did not authorize an indictment. It was held that the Superior Court had jurisdiction to proceed by indictment. In other cases it has been held that where by statute it is made the duty of a certain officer to make a complaint, the statute is merely directory and does not exclude any other competent person from making a complaint for violation of the law. *Commonwealth v. Gay*, 153 Mass. 211. *Commonwealth v.*

McDonnell, 157 Mass. 407. In *Commonwealth v. Rawson*, 183 Mass. 491, the defendant was indicted for violation of a by-law of a town adopted under R. L. c. 25, § 23. Section 73 of the same chapter recites that "unless otherwise provided, he shall prosecute for all fines and forfeitures inuring to the town." It was held that under the decision of *Commonwealth v. Fahey*, *supra*, and *Commonwealth v. Smith*, *supra*, the indictment could not be sustained.

The cases above referred to were decided under statutes different from that under consideration. We are of opinion that the statute in question is distinguishable from those therein construed, each of which related to the recovery of fines and forfeitures or penalties to the use of a city or town for violation of a statute, ordinance or by-law, and where the person authorized to make the complaint was specifically designated. As the statute under which the defendant was indicted is of general application, and as the Superior Court which has original jurisdiction of all crimes, and appellate jurisdiction of crimes that are tried and determined before the police, district or municipal courts or before trial justices (R. L. c. 157, § 7), is not expressly excluded, and as the language of the statute is permissive and not exclusive, we are of opinion that it was not intended by the framers of the statute to limit proceedings to the courts therein named to the exclusion of the jurisdiction of the Superior Court, but that it was intended for the convenience of parties in cases within the statute to enlarge the territorial jurisdiction of those courts by giving them authority to institute prosecutions in the place where the mother of the child lives, regardless of the place where the act was committed. See *Commonwealth v. Haynes*, *supra*; *Commonwealth v. Gay*, *supra*; *Commonwealth v. McDonnell*, *supra*.

It follows that the Superior Court had jurisdiction to proceed by indictment.

Motion overruled.

THOMAS HURLEY'S CASE.

Suffolk. March 10, 1920. — March 31, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Workmen's Compensation Act, Review.

Where, in proceedings under the workmen's compensation act, there has been a hearing by a committee of arbitration under St. 1911, c. 751, Part III, § 7, as amended by St. 1912, c. 571, § 12, and the committee has made an award of compensation by weekly payments and no claim for a review of their findings has been filed, upon a claim under St. 1911, c. 571, Part III, § 12, as amended by St. 1914, c. 708, § 11, for a review of the weekly payment, the questions, whether the employee received his injury in the course of his employment, and whether, when injured, he was an employee of the person insured, are not open.

APPEAL to the Superior Court from a decision of the Industrial Accident Board, affirming and adopting findings of a single board member, made by him on a review under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, of an award previously made to Thomas Hurley by reason of an injury received on August 1, 1913, while employed by the city of Marlborough.

In the Superior Court the appeal was heard by *Wait, J.* Material findings and rulings of the single member of the board are described in the opinion. By order of the judge a decree was entered continuing the award of \$6 per week for an indeterminate period subject to the provisions of the workmen's compensation act. The insurer appealed.

St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, and St. 1917, c. 297, § 8, reads as follows:

"Any weekly payment under this act may be reviewed by the Industrial Accident Board or any member thereof, and on such review the board or member may, in accordance with the evidence and subject to the provisions of this act, issue any order which may be deemed advisable. If the case is heard and decided by a member, his decision shall be subject to review as provided by sections seven and ten of Part III and the general provisions of the act."

St. 1911, c. 751, Part III, § 4, as amended by St. 1912, c. 571, § 9,

reads as follows: "If the association and the injured employee reach an agreement in regard to compensation under this act, a memorandum of the agreement shall be filed with the Industrial Accident Board and, if approved by it, thereupon the memorandum shall for all purposes be enforceable under the provisions of Part III, section eleven. Such agreements shall be approved by said board only when the terms conform to the provisions of this act."

St. 1911, c. 751, Part III, § 7, as amended by St. 1912, c. 571, § 12, reads as follows: "The committee on arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be held in the city or town where the injury occurred, and the decision of the committee, together with a statement of the evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Accident Board. Unless a claim for a review is filed by either party within seven days, the decision shall be enforceable under the provisions of Part III, section eleven." This has been amended by St. 1917, c. 297, § 4, but the amendment is not material to this decision.

H. S. Avery, for the insurer, submitted a brief.

J. W. McDonald, for the employee.

CROSBY, J. The employee claims that on August 1, 1913, while in the employ of the city of Marlborough as a laborer, he received personal injuries that arose out of and in the course of his employment. It appears by the record that compensation was paid by the insurer to the employee under an agreement therefor; that the agreement was filed with the Industrial Accident Board on August 30, 1913. St. 1911, c. 751, Part III, § 4, as amended by St. 1912, c. 571, § 9. It also appears that a hearing was held before a committee of arbitration on October 13, 1914, to determine whether the employee was incapacitated as a result of the injury; that the committee so found, and compensation was awarded at the rate of \$6 weekly to be continued for an indeterminate period, and has been paid by the insurer up to April 2, 1918; and that no claim for review of these findings was filed. St. 1911, c. 751, Part III, § 7, as amended by St. 1912, c. 571, § 12 (St. 1917, c. 297, § 4).

On April 2, 1918, a hearing was held before a single member

of the board under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, (St. 1917, c. 297, § 8,) at which the insurer contended and offered evidence to show that the employee did not receive his injuries in the course of his employment, that they did not arise out of it, and that he was not an employee of the city at that time. The single member states that the greater portion of the evidence introduced by the insurer related to the question "whether or not the injury arose out of the employment" and was received *de bene*; he afterwards ruled that it was not open to the insurer under Part III, § 12, to show that the injury did not arise out of the employment. He states that he is unable to find that the disability resulting from the injury has ceased. It cannot be said that the conclusion is without evidence to support it. The board on review affirmed and adopted the findings and rulings of the single member and found that the employee is entitled to a continuance of compensation at the rate of \$6 a week subject to the provisions of the act, and a decree has been entered in the Superior Court in accordance with the finding.

The ruling of the single member affirmed by the board was clearly right. The committee of arbitration having fixed the compensation at \$6 weekly, it is to be presumed that it was found that the employee's injury was received in the course of and arose out of his employment while he was in the employ of the city; and as no claim for review was filed the decision of the committee stood and became enforceable in the Superior Court. *Young v. Duncan*, 218 Mass. 346, 353. In the later proceedings instituted under Part III, § 12, the only matters then properly before the single member were the review of the previous decision respecting the weekly payment awarded and the issuance of such order as might be deemed advisable. An order having been so issued, the effect of which is to continue the compensation previously allowed, the employee is entitled to be paid at the rate of \$6 a week since April 2, 1918.

Decree affirmed.

MARY A. O'KEEFE & another vs. MARY M. SHEEHAN
& others.

Essex. December 8, 1919. — April 1, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Equitable Restriction. Equity Jurisdiction. To enjoin violation of equitable restriction, To enjoin violation of municipal ordinance. *Nuisance. Municipal Corporations, By-laws and ordinances.*

In a suit in equity to enjoin the defendant from violating an equitable restriction, the following facts appeared: The plaintiff and the defendant owned adjoining lots, acquired by mesne conveyances from a common grantor and subject to a restriction "that neither the grantee nor his heirs or assigns shall carry on any trade or business upon said lot that shall be in the nature of a nuisance to the abutting owners or neighborhood." For some years the defendant carried on a contracting business, beginning in 1908 and gradually increasing, and maintained a stable upon the premises, which use of the land was a nuisance to the plaintiff. The plaintiff had not acquiesced in such use of the premises nor given the defendant any reason to believe that he would be satisfied with it. The stable was destroyed by fire in 1915, and the plaintiff notified the defendant in substance that, if any attempt were made by him to resume the former business on the premises, or otherwise to violate the terms of the restriction, it was the plaintiff's intention to seek an injunction. The defendant replied that he intended to reconstruct the stable and to carry on business as before, and procured a municipal license to build and use a stable for fifty horses upon the premises. The plaintiff instituted his suit in February, 1916, and it was referred to a master. On March 25, 1916, the defendant's stable was completed and occupied. The hearings before the master began on March 27 and ended on June 13, 1916. The master filed a report on March 6, 1918, in which he found in substance, that the evidence upon the question, whether the use of the stable was "in the nature of a nuisance," was "not very complete nor very satisfactory," that "it could hardly be otherwise," and that he could not see "how any one can tell how this will be until a fair trial of the new arrangements is given." *Held, that*

(1) The plaintiff was not prevented from maintaining the suit by laches, waiver or acquiescence;

(2) The negative findings of the master upon the question whether the defendant's use of the premises was a nuisance required that the bill be dismissed without prejudice and without costs.

An owner of land cannot maintain a suit in equity to enjoin the erection of a building upon adjoining land which is in violation of a municipal ordinance if such structure is not in itself noxious nor unusually dangerous nor in violation of the private rights of the plaintiff.

BILL IN EQUITY, filed in the Superior Court on February 14, 1916, seeking to enjoin the defendants from violating an equitable restriction, described in the opinion, contained in a deed of land in Lynn owned by them and adjoining land of the plaintiffs, and from violation of a municipal ordinance relating to the erection of buildings.

In the Superior Court the suit on March 27, 1916, was referred to a master, who filed a report on March 6, 1918. Findings of the master on the question of laches were as follows:

"When the defendant David J. Sheehan bought the property at 424 Broadway in the summer of 1907 he told John A. O'Keefe, who then lived at 414 Broadway, that he was going to make a start there in the contracting business and see what he could do. He began in a small way but gradually increased until he is now doing a very substantial business. In 1908 he built the first extension of his stable. No notice of the application for the license to build this stable was given to any of the plaintiffs, who were not then owners of adjoining property. O'Keefe, however, knew that at the time the foundations were built there was to be a barn erected upon the premises.

"After the first extension was built and before the O'Keefe family moved from 414 to 418 Broadway in 1911, they began to be troubled by the odor, noise and flies from this first extension, and continued to be so annoyed by these causes for several years before 1911. During this time O'Keefe had from time to time complained to Sheehan about the barn. It does not appear that he brought any proceedings to enforce the restrictions and it is admitted that he never called Sheehan's attention to the restrictions in question. He (O'Keefe) knew of the restrictions when he bought number 414 Broadway in 1886.

"In 1911 the O'Keefe family moved to No. 418, adjoining the Sheehan premises. The odors from the barn were then noticeable and annoying. O'Keefe complained of the odor to Sheehan, who consequently bricked up a window in the basement of the stable which opened toward the O'Keefe house. This made the odor less objectionable, but it still remained. In the spring of 1912 the second addition was built. O'Keefe was not notified of the application for leave to build this erection, which was granted in April, 1911, before he bought the adjoining premises, number 418 Broad-

way. But before the second addition was begun in the spring of 1912, the O'Keefe family had removed to number 418 and knew that the building was going up and what it was to be used for. Mr. O'Keefe then looked up the records of the Board of Health and learned the date when the license was issued. He then talked with Sheehan about the odor from the stable, who said that he proposed to do all he could to stop it.

"As Sheehan's business increased after the erection of the second addition the annoyances became more noticeable. From time to time O'Keefe complained to Sheehan. Sheehan on several occasions gave O'Keefe to understand that he was contemplating moving his stable down town. Up to 1914 there had been no unpleasantness between them, but in that year, as the result of the building of a fence by O'Keefe to shut out the view of the stable door from his house, some differences arose as to whether the fence was on the correct line. O'Keefe then told Sheehan that he had made his place such a nuisance that it was necessary for him (O'Keefe) to have the fence. O'Keefe also about this time began to draft a bill in equity for an injunction but never filed it.

"Besides the stable the defendant Sheehan built on the lot in question in 1912 and 1913 an open shed for the storage of carts, at a cost of about \$600. Also a small office building costing perhaps \$400, and a storage shed costing about \$2,200.

"The above are substantially all the facts upon which the question of laches and acquiescence is to be determined, which is a mixed question of law and fact and perhaps not within the province of a master to determine. From these facts and the inferences to be drawn from them I find that when the defendant Sheehan set up in the contracting business at 424 Broadway, it was not the intention of John A. O'Keefe, who then owned number 414 to insist that the restrictions forbade such a business as was then conducted; that from time to time, although he complained of the increasing annoyances due to the growth of the defendant's business and the additions to the stable, he still had no definite intention to enforce the restrictions by suit, partly from a desire to go as far as a proper sense of friendliness would urge in the recognition of the defendant's rights and interests and partly because of a hope created by the defendant's statements that he intended at some time to remove his business to another location. The erec-

tion of a stable did not necessarily involve a violation of the restriction. In that respect the failure of O'Keefe to object to the building of the stable is to be taken with a different significance from the failure to make timely objection to the erection of a building which is a plain and certain infraction of the terms of a restriction. Whether a stable is to be a source of annoyance to a neighborhood or not depends upon how it is used. The same thing may be said of a contracting business. A willingness to suffer some inconvenience and annoyance from a stable at the hands of a friendly neighbor who sincerely professes to be anxious to remove all cause of complaint ought not, I think, to be interpreted as general leave and license for the infliction of any amount of annoyance and discomfort. Such conduct cannot fairly justify the party causing the annoyance in believing that the other is satisfied permanently to tolerate substantial annoyances materially interfering with the ordinary comfort in the occupation of his home. The principal ground on which the defence of laches is sustained by the courts is that it would be unfair to a defendant to wait a long time while he is making his arrangements and adjusting his business and property to conditions which he has reason to believe will be permanent because he deems them in conformity with law or satisfactory to others and then to make an attack upon him and require him to undo that which he has done innocently and at great cost.

"I can see nothing in this case that could fairly have given Sheehan reason to believe that the plaintiffs would be satisfied with such a use of his premises in his business as would constitute a nuisance to them; nor to believe that they had abandoned the right to an injunction restraining in terms such a use, which I take it would be substantially the form of injunction in this case if the plaintiffs should get one. So far as I have the power, therefore, I find that the plaintiffs are not prevented in this case by laches, waiver or acquiescence."

Other facts found by the master are described in the opinion.

The suit came on to be heard by *Hammond, J.*, in the Superior Court, and by him was reserved for determination by this court upon the pleadings, the master's report and the defendants' exceptions thereto.

H. A. Bowen, (S. Parsons with him,) for the defendants.

B. B. Jones, for the plaintiffs.

PIERCE, J. Upon a reservation from a judge of the Superior Court, this case is before the full court upon the pleadings, the master's report, and the defendants' exceptions thereto. It is a bill in equity wherein the plaintiffs seek to have the defendants restrained and enjoined from using or permitting the use of certain premises for stabling horses, or for the purposes of a general contracting business in violation of certain restrictions upon the use of the defendants' premises, which restrictions the defendants concede attach to their premises and the premises of the plaintiffs, and enure to the benefit of the premises of both plaintiffs and defendants. The plaintiffs also seek a mandatory injunction commanding the defendants to remove such portion of a stable upon the premises of the defendants, as has been erected at a distance of less than three feet from the boundary line of the premises of one of the plaintiffs, in violation of an ordinance of the municipal council of the City of Lynn passed on May 23, 1911.

Previous to 1881, one Batcheller owned a tract of land in Lynn, Massachusetts, which by reason of its locality and for other reasons was adapted to residences of the best class, if its availability for such purposes as a tract should be preserved by suitable restrictions. Between 1881 and 1883, he divided this tract into lots and sold certain of them (hereinafter called A, B, and C) to the predecessors in title of the lots now held and occupied by the several plaintiffs and defendants. Each of the original conveyances and all the mesne conveyances in the several chains of title from the first grantor to the last grantee were granted subject to the following restrictions: "This deed is granted upon the conditions . . . that neither the grantee nor her heirs or assigns shall carry on any trade or business upon said lot that shall be in the nature of a nuisance to the abutting owners or neighborhood." Lots A and B are owned by the plaintiffs. Lot C is owned by one of the defendants. Lot A adjoins lot B, and lot B adjoins lot C. There is a stable on lot C distant seventy-six feet from lot B and one hundred and eighteen and one half feet from lot A.

When the defendant Mary F. Sheehan took title to lot C, in 1907, the buildings thereon consisted of a dwelling house and a

small private barn. Her son, the defendant David J. Sheehan, in 1907 started out to do business for himself, on lot C, as a contractor and builder. Before the license was granted in July, 1907, he kept in the barn two horses; and, during the period covered by the license, three horses. The defendant David J. Sheehan Company was organized in 1908, and took over the business of David J. Sheehan. Sheehan is and always has been the president, treasurer and general manager. It is a family corporation, the stock in which is owned almost entirely by David J. and his wife. Between 1908 and 1912 inclusive, under a municipal license the barn was from time to time enlarged until in 1912 it and the extensions made a barn one hundred and seventy feet long by thirty-two feet wide. Within the same period under municipal licenses, the number of horses kept on the premises increased from three to about sixty. The master reports at great length the conditions under which the business of the defendants was carried on before the stable was burned on December 27, 1915. These conditions manifestly were calculated to cause a material and substantial disturbance and annoyance to the plaintiffs as owners and occupiers of the adjoining lands, and fully warranted the master in his conclusion of fact "that for some time before the Sheehan stable was burned it had been a source of annoyance and discomfort to the O'Keefes living next door and to the O'Keefes living at 414 Broadway by reason of offensive odors and the pounding of horses and the presence in unusually large quantities of flies attracted by or bred in the exposed manure stored under the stable." The defendants properly concede that the conditions of the use of the premises and the actual discomforts and annoyances to the plaintiffs in the use of their property, which naturally flowed therefrom, constituted a private nuisance at common law as well as a violation of the restrictions of their deed, but contend that the business as it was carried on was not a legal nuisance because of the licenses to use the barn as a stable. *Murtha v. Lovewell*, 166 Mass. 391. *Sawyer v. Davis*, 136 Mass. 239. *Levin v. Goodwin*, 191 Mass. 341. Of course this is true if the business or trade licensed cannot be carried on without interfering with the comfort of adjoining owners or neighborhood in the way complained of; but is without force and untrue if the conditions which would amount to a common law nuisance are not attributes of the business, but are the result of

its negligent management or, as in the case at bar, are the natural consequences of avoidable unsanitary and illegal conditions.

The defendants further contend that the restrictions contained in the several deeds are without effect because the negative easement therein attempted to be created, and attached to all the parcels of land, is a "reservation of no greater right than the law imposes upon every such parcel of real estate in favor of an abutting owner or the neighborhood." We cannot agree with this argument: there is nothing in the policy of the law which is hostile to the protection of property and property rights, through a covenant or contract which is supplementary and in addition to that protection which the law affords as of right; nor do we think a municipal license to do acts, which without it would create a common law nuisance, nullifies an existing agreement which runs with land not to do acts nor to create conditions which are illegal at common law, in the absence of a legislative or municipal license.

The barn was almost totally destroyed by fire on December 27, 1915. On December 28, 1915, the plaintiffs notified the defendants "... that it is the intention ... if an attempt be made to resume said business on said premises or to use said premises in any other manner that would be 'in the nature of a nuisance to the abutting owner and the neighborhood,' to seek a restraining order from the court." On January 31, 1916, the defendants wrote the plaintiffs as follows: "... You are further notified that I intend forthwith to rebuild the stable which was recently destroyed by fire on my said premises, and to use the reconstructed stable for the stabling of horses in the same manner and to the same extent as the business of the David J. Sheehan Company was carried on before said fire." On February 2, 1916, a municipal license issued to the defendants to build and use a stable for fifty horses upon the premises at 424 Broadway (lot C). On February 14, 1916, immediately after the defendants began the erection of the new stable, this bill was filed. The new stable had been completed and was occupied March 25, 1916. The hearings before the master began on March 27, and ended on June 13, 1916. It is not contended that there has been a violation by the defendants of the terms of their license. Upon the question whether the use of the stable was "in the nature of a nuisance" after it was rebuilt and possession taken on March 25, 1916, the

master found the evidence "not very complete nor very satisfactory," and further found that "it could hardly be otherwise." He noted many improved conditions but found that "only experience will tell whether these improvements will effectually remove the objectionable features of the old stable or not." He further stated: "It may well be that notwithstanding all the precautions prescribed in the license, the new stable will prove a substantial annoyance to the occupants of the adjoining premises. I cannot see, however, how any one can tell how this will be until a fair trial of the new arrangements is given." We are of opinion the plaintiffs are not prevented from maintaining this suit by their laches, their waiver or acquiescence, but we are constrained to the opinion that the negative findings of the master which resulted from his inability to determine upon the evidence whether the use of the premises within the short interval of time that had elapsed between the occupation of the new stable and the hearing was a nuisance or a use in the nature of a nuisance make it imperative, in the opinion of a majority of the court, that an injunction should not now issue and require that the bill should be dismissed without prejudice and without costs.

An ordinance of the city of Lynn passed on May 23, 1911, provided that "No tenement or dwelling house or other building outside fire limits and more than ten feet in height shall be erected, altered or located on a lot so that any part of same including cornice, bay window, porch or other projection shall be within three feet of said lot lines or any adjoining lot lines. . . ." It was found by the master that the stable was outside the fire limits, was more than ten feet in height, and was within three feet of the plaintiffs' lot line. It was rebuilt and altered, and was not repaired as the defendants contend. It therefore was a statutory nuisance to the extent it was rebuilt, erected and altered in violation of the ordinance. *Worcester Board of Health v. Tupper*, 210 Mass. 378.

The defendants contend that the plaintiffs have no "standing to enforce this municipal police regulation." The question whether the remedy by fine or in equity is a purely public remedy is settled in this Commonwealth by *Hagerty v. McGovern*, 187 Mass. 479, wherein, in a suit in equity to restrain the owner of land from building a house within three feet of the boundary line of his lot in

violation of a city ordinance, it was said by Barker, J., at page 480: "The erection upon it of structures which in themselves are not noxious or unusually dangerous is not a use in violation of the private rights of an adjoining owner, even if in some degree the enjoyment of the adjacent land is made less complete or beneficial than if the land were bare. The breach of the ordinance by the defendant is not an invasion of the plaintiff's private right. All the injurious results of the erection of the defendant's building come not from his violation of the ordinance, but from the use of his land for building. The plaintiff shows no peculiar damage due to the breach of the ordinance, and no right to have private relief because of its violation. See *Jenks v. Williams*, 115 Mass. 217." *Rudnick v. Murphy*, 213 Mass. 470, 471. The fact that the business carried on upon the premises in *Wright v. Lyons*, 224 Mass. 167, was a common law nuisance unless legalized by a municipal license, distinguishes that case from *Hagerty v. McGovern*, *supra*, and the case at bar where the nuisance, if any there was, is predicated solely upon a violation of a municipal ordinance. *Dahlin v. Walsh*, 192 Mass. 163. *Field v. Gowdy*, 199 Mass. 569, 573.

It follows that the bill upon both issues must be dismissed, without costs and without prejudice.

Decree accordingly.

TREMONT TRUST COMPANY vs. LOUIS BURACK.

Suffolk. January 5, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & CARROLL, JJ.

Bills and Notes, Payment of check stopped by drawer. *Contract*, Construction, Validity. *Negligence*, Of bank, Contract avoiding results of. *Bank Words*, "Inadvertence or accident."

The drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a *bona fide* holder for value; and, in the absence of an express contract limiting its implied obligation to the drawer, if a bank upon which the check is drawn pays the check after receiving an order to stop its payment, it does so at its peril.

The drawer of a check gave to the bank upon which it was drawn an order to stop its payment and, at the same time and at the request of the bank, signed, without

a seal, an agreement, printed on a card, that he would hold the bank harmless for the amount of the check "and for all expenses and costs incurred by it on account of refusing payment of" the check, and further, that he would not hold the bank liable "on account of payment contrary to this request if same occur through inadvertence or accident." Upon the back of the card was a printed statement that the bank received the request "with the understanding and upon the express condition" that it would "use the best methods known to it to prevent oversight and accident," but that it would "not be in any way liable for its act should said check be paid by it in the course of its business." The day following the receipt of the notice to stop payment, the check was presented to the bank and "in a manner which" the bank's bookkeeper "could not explain, it being the last day of the month, he being busy with making up accounts, the check got through" and was paid, resulting in an overdraft of the drawer's account. In an action by the bank against the drawer for the amount of the overdraft, a jury, in answer to a special question, found that the bank was negligent in failing to stop payment of the check. *Held*, that

(1) The meaning of the agreement was that the bank should be exonerated from liability to the drawer if, through the kind of negligence above described, it paid the check after receiving the notice to stop payment;

(2) The agreement was not contrary to public policy and was valid.

CONTRACT for \$339.49, alleged to have been "money paid by the plaintiff at the request of the defendant." Writ in the Municipal Court of the City of Boston dated June 26, 1918.

Upon removal to the Superior Court, the action was tried before *Morton, J.* It appeared that the plaintiff had paid to the holder the amount of a check for \$400, drawn upon it by the defendant, which was in excess of the amount which the defendant had on deposit with the plaintiff. This action was to recover the amount of such excess. Before the check was presented for payment, the defendant had given to the plaintiff notice to stop payment of it. The circumstances of the payment by the bank, recited in the record, were as follows: The check reached the plaintiff bank through the clearing house on the day following the notice of the defendant to stop its payment and was paid by the plaintiff. The bookkeeper of the bank testified that he received the card "notifying him to stop payment of the check and made a notation on his book, but, in a manner which he could not explain, it being the last day of the month, he being busy with making up accounts, the check got through and was debited against the defendant's account."

Other material evidence is described in the opinion. At the close of the evidence, the plaintiff asked for the following rulings, among others:

"4. If the defendant entered into the agreement [quoted in the opinion] . . . with the plaintiff then the plaintiff will not be liable for its failure to stop payment on the \$400 check if the same occurred through inadvertence or accident, and if it used the best methods known to it to prevent oversight and accident.

"5. If the bank used the best methods known to it to prevent oversight and accident to stop payment on a check and in good faith paid the defendant's check for \$400 through oversight or accident then it is not liable to the defendant for the amount of said check in accordance with his agreement of April 29, 1918."

The rulings were refused. A material portion of the charge to the jury is quoted in the opinion. The judge submitted special questions to the jury, which, with the answers thereto, were as follows:

"1. Was the plaintiff negligent in failing to stop payment after receiving the order to stop?" The jury answered, "Yes."

"2. Did the defendant subsequent to the payment of the check, ratify its payment?" The jury answered, "No."

The jury found for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

A. Berenson & H. U. Smith, for the plaintiff.

S. Hurwitz, A. Hurwitz & F. L. Simpson, for the defendant.

PIERCE, J. This is an action of contract to recover from the defendant the amount of money which the plaintiff (hereinafter called the bank) on presentment paid to a holder of a check drawn on the bank by the defendant, in excess of the deposit standing to the credit of the defendant when the check was paid. The defendant admits that he drew the check, that it was an overdraft, and that it was paid by the bank to the holder through the clearing house. The plaintiff and the defendant are in substantial agreement that, on the day the check was issued and before presentment to or payment by the bank, the defendant notified the bank to stop payment of the check. It is also agreed that, without reading, the defendant at the time when he ordered the payment stopped, at the request of the plaintiff signed a card upon which the following agreement was printed:

"The Tremont Trust Company, Boston, Mass., will please stop payment of the above described check. The undersigned

agrees to hold the Tremont Trust Company harmless for said amount and for all expenses and costs incurred by it on account of refusing payment of said check and further agrees not to hold the Tremont Trust Company liable on account of payment contrary to this request if same occur through inadvertence or accident.

“Drawer

L. H. Burack”

On the reverse side of the card appeared the following:

“The Tremont Trust Company receives this request with the understanding and upon the express condition that it will use the best methods known to it to prevent oversight and accident, but that it shall not be in any way liable for its act should said check be paid by it in the course of its business.”

In passing it is to be observed that the fact that the defendant did not read what was printed on the front and back of the card cannot affect the rights and obligations of the parties, because in the absence of fraud the defendant is assumed to have assented to all the provisions of that contract, and agreed to be bound by its terms. *Fonseca v. Cunard Steamship Co.* 153 Mass. 553.

By the great weight of authority, the drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a *bona fide* holder for value. *Florence Mining Co. v. Brown*, 124 U. S. 385. See cases collected in *Morse on Banks & Banking*, §§ 397-399, and in 7 C. J., *Banks & Banking*, § 429. *Pease & Dwyer v. State National Bank*, 114 Tenn. 693. In the absence of an express contract limiting its implied obligation to the drawer, the drawee pays at his peril when payment of the check has been stopped. *Usher v. A. S. Tucker Co.* 217 Mass. 441, 443. The consideration for an express agreement or for the implied obligation not to pay a holder of a check after payment of it has been stopped, is found in and springs from the mercantile relation of the parties and the reciprocal rights and obligations which the law attaches to that relation. The payee is not an assignee of the fund and the bank incurs no obligation to him before its acceptance of the check; his rights are against the drawer of the check. R. L. c. 73, § 206. *Carr v. National Security Bank*, 107 Mass. 45. *Bullard v. Randall*, 1 Gray, 605.

In the case at bar the jury found upon issues submitted to it that the plaintiff was "negligent in failing to stop payment after receiving the order to stop." Upon the record two decisive questions are presented: (1) Do the terms of the agreement include negligence? and (2) Is it illegal for a bank to contract against the negligence of its employees in failing to stop the payment of a check after receiving an order to stop its payment?

The word "inadvertence" in the printed agreement embraces the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition or character of being inadvertent, inattentive, or heedless. The word "accident" is used in the sense of a happening of an event without the concurrence of the will of the person by whose agency it was caused. It is manifest the quoted words were intended to exonerate the bank from the kind of negligence shown by the record and we are unable to see anything illegal, or anything opposed to public policy, in a stipulation or agreement which relieves a bank so circumstanced from the results of the mere inattention, carelessness, oversightedness, or mistakes of its employees. It follows that the plaintiff's exceptions to the charge, wherein it was said "The law, as I understand it, does not recognize the right of the bank to contract against its own negligence," was properly saved, as inconsistent with requests numbered 4 and 5, and its exceptions must be sustained.

Exceptions sustained.

**HURLBUT ROGERS MACHINERY COMPANY vs. BOSTON AND MAINE
RAILROAD.**

Middlesex. January 16, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CARROLL, & JENNEY, JJ.

Railroad. Easement.

The provisions of Sts. 1861, c. 100; 1874, c. 372, § 107; Pub. Sts. c. 112, § 215; R. L. c. 111, § 271; St. 1906, c. 463, Part II, § 80, prevent the acquiring, by the owner of land adjoining a railroad location, of a title by adverse possession to the whole or to any part of the location or to an easement therein of support for structures on the adjoining owner's land.

PETITION, filed in the Land Court on July 10, 1918, for the registration of the title to certain land in Sudbury.

The petition was heard by *Davis*, J. Material facts found by him are described in the opinion. As to the title to the "small triangular parcel" described in the opinion, the judge, upon "all of the facts . . . found that, if title by adverse possession could, as matter of law, be acquired by the petitioner and its predecessors, it had been so acquired; but ruled as matter of law that title could not be so acquired, and ordered a decree accordingly." The petitioner alleged an exception.

H. A. Baker, for the petitioner.

A. R. Tisdale, for the respondent.

BRALEY, J. The first question is, whether any portion of the land described in the petition for registration comes within the location of the respondent's railroad. If the boundary lines shown on the plan filed with the petition are the true boundaries, it is manifest that no part of the location is included. But the respondent contended and introduced evidence tending to show that the northerly line of the location ran through the extreme southwesterly corner of the land and buildings leaving a small triangular parcel and part of the chimney within the limits of the railroad location. The boundary being in controversy it was a question of fact on all the evidence, including the various surveys and plans, and the actual occupation and user by the parties, where the true line originally ran and was to be established in the ascertainment of the petitioner's title. *Dodd v. Witt*, 139 Mass. 63. *Temple v. Benson*, 213 Mass. 128. *Morrison v. Holder*, 214 Mass. 366, 368, 369. *Hobart v. Towle*, 220 Mass. 293. The adverse finding, that, under the grant appearing of record, the petitioner's land extended only to the northerly side line of the location, having been warranted by the evidence is conclusive. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89. *Boston & Albany Railroad v. Reardon*, 226 Mass. 286, 291.

The petitioner, however, having also claimed title by adverse possession, the next question is, whether on this ground registration could be decreed. The continuous, open, peaceable and unopposed use and occupation by the petitioner of the premises under claim of title for more than the prescribed period undoubtedly is shown by the record, and was found at the trial. It

ordinarily would follow that the petitioner would be entitled to registration. *Holloran v. Holloran*, 149 Mass. 298. *First Baptist Church of Sharon v. Harper*, 191 Mass. 196, 208. *Keith v. Kennard*, 222 Mass. 398. R. L. c. 128, § 18, as amended by St. 1905, c. 249, § 2. But the respondent while not claiming title by deed relies on a location acquired presumably under Gen. Sts. c. 63, §§ 17, 18, the validity of which is not questioned. The petitioner's deed although dated January 16, 1872, was not recorded until 1875, and the taking by the respondent, who is not shown to have had actual notice of the conveyance, was on July 31, 1872. By St. 1861, c. 100, in force when these transactions occurred, and St. 1874, c. 372, § 107, Pub. Sts. c. 112, § 215, R. L. c. 111, § 271, St. 1906, c. 463, Part II, § 80, of similar import and effect, which were operative during the entire period during which prescription is asserted, no length of possession or of occupation of the land belonging to or included within the location of a railroad by an adjoining owner or occupant shall create in him any right to the land belonging to the railroad corporation "so inclosed or occupied." The purpose of these enactments is that title by adverse possession, where the location has not been abandoned, cannot be gained by an adjoining landowner to the whole or a part of a railroad location whether it is acquired by the corporation by purchase or by the exercise of the right of eminent domain. *Boston & Albany Railroad v. Reardon*, 226 Mass. 286. *Hall v. Boston & Maine Railroad*, 211 Mass. 174.

The case of *Amee v. Boston & Albany Railroad*, 212 Mass. 421, on which the petitioner places much reliance, is plainly distinguishable. The respondent in the case at bar never having abandoned the location, the statute governs, while in *Amee v. Boston & Albany Railroad* there was evidence from which abandonment could have been found, and if so found then there was no location in existence upon which the prohibited intrusion could be made.

It is further urged that even if no title in fee exists, yet an easement of support for the building and chimney has resulted which can be enforced. But the express wording of the statute negatives "a right to such land of the corporation" whether in the nature of a fee or of an easement or servitude of the character disclosed by the record.

We discover no error in the rulings of the trial judge and the exceptions must be overruled.

So ordered.

NORAH F. BURKE vs. EVA T. KELLOUGH.

Suffolk. February 24, 1920. — April 1, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Evidence, Competency, Self-serving. Practice, Civil, Exceptions.

Where, at the trial of an action by a woman for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate upon a sidewalk by a broken spout on a house of the defendant, there has been admitted evidence of the plaintiff tending to show that, immediately after she fell, she saw a piece of pipe sticking into the street near the defendant's building, that she then made a mark with the heel of her shoe where she fell, that the next day she and her counsel, his associate and a witness visited the place of her fall, swept off a light snow that had accumulated during the night, saw the mark made by her heel, and took photographs, and that, when the photographs were taken, she held a broom indicating the place of her fall, it is material, for the purpose of laying a foundation for the admission of the photographs and to connect and make relevant the evidence as to the appearance and conditions of the sidewalk at that place and time, to permit the plaintiff to testify that the bottom of the broom, as she held it when the photograph was taken, was on the place where she had fallen and where she had marked with the heel of her shoe and that a witness then made measurements at that place; and such testimony is not incompetent as being self-serving or "manufactured."

At the trial of the action above described, testimony from a deposition of the associate counsel for the plaintiff properly may be admitted, tending to show that, at the time when the photographs were taken, he noticed ice where the snow was swept off, and made measurements, which he described in detail.

At the trial of the action above described, the associate counsel in his deposition was asked, "Have you noticed the situation as to the conductor since" the time when the photographs were taken, and the defendant objected to the question. The deponent answered, "It looks like a new conductor." The answer was admitted in evidence and the defendant saved an exception but did not move to have the answer stricken out. *Held*, that the question was a proper one; that, although the answer was not responsive and presumably must have been stricken out if the defendant had so requested, his failing so to request waived any objection he might have to the answer, and therefore that the exception must be overruled.

TORT for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate on a sidewalk, abutting on

premises of the defendant on Prescott Street in that part of Boston called East Boston, by a broken spout or leader on the defendant's house. Writ dated February 12, 1917.

In the Superior Court the action was tried before *Morton, J.* Material evidence and exceptions saved by the defendant are described in the opinion. There was a verdict for the plaintiff in the sum of \$650; and the defendant alleged exceptions.

The case was submitted on briefs.

H. A. Wilson, F. Juggins & T. F. Murphy, for the defendant.

F. L. Norton, for the plaintiff.

PIERCE, J. This case is before this court solely on the defendant's exceptions to rulings admitting testimony in an action to recover damages for injuries resulting to the plaintiff from a fall, on a sidewalk abutting on the defendant's premises, caused by slipping on rough ice which the plaintiff contended was formed from water which flowed from a broken conductor upon a building owned by the defendant.

It appeared in evidence from the testimony of the plaintiff, that when she slipped and fell she "noticed a piece of pipe sticking up out of the street . . . right near the building and saw marks that her foot made as she fell." It further appeared in testimony that she visited the scene of her accident the same evening with a friend, *Rendle*, and "noticed hubbly ice on the sidewalk between the building and the other edge of the sidewalk." On the next morning the plaintiff with *Rendle*, her sister, her counsel, *Mr. Norton*, and his associate, *Mr. Jenney*, went to the place of the accident. There had been a light snow during the night. She told her counsel where she fell; a broom was brought and her counsel "swept a strip across the sidewalk as large as four feet." She testified she "saw a mark on the ice which she was satisfied was the scrape she had made with the heel of her shoe when she fell because she saw it three times the night before." She further testified that she held the broom indicating the place where she fell when photographs were taken.

The defendant objected to the question put to the plaintiff, "Where was the bottom part of the broom at the time the photograph was taken, with reference to the place where you fell?" and excepted to the answer, "It was on the place where I slipped where I marked already with my foot." She also objected to the

question put to the same witness, "Were there some measurements taken as to where you slipped and fell?" and excepted to the answer, "Mr. Rendle measured."

A deposition of the former associate counsel, Mr. Jenney, was introduced in evidence. Without objection, he testified that he visited the premises with the plaintiff, her attorney and the witness Rendle; that he "noticed that the conductor from the roof was broken and was missing for a distance of ten or twelve feet above a steel elbow where the bottom part of the gutter apparently rested when it was in place. Deponent was then asked the following question: 'What was done while you were there relative to the snow on the sidewalk?' Deponent, beginning to answer, said 'Miss Norah Burke was asked where she fell and she pointed out a certain spot' . . . at this point defendant objected to the portion of the answer then given," but did not ask, nor did the presiding judge refuse, to have the answer stricken out. The deponent without objection, continued, "Mr. Norton took a broom and swept off the snow at that point." The deponent was then asked, against the objection of the defendant, "What did you notice relative to the spot from which the snow had been removed after the snow was removed?" and was permitted to answer subject to the exception of the defendant, "When the snow was swept off there was ice underneath it." The deponent, against the objection of the defendant, was then asked, "Did you take any measurements with reference to the location of the spot pointed out by Miss Burke?" and subject to the defendant's exception was permitted to answer, "I did." It is plain no harm resulted to the defendant from this question and answer. The deponent was then asked, against the objection of the defendant, "What measurements did you take?" and was permitted to answer, subject to the exception of the defendant, "The measurement of the sidewalk was eight feet, the measurement from the house to the spot was two and one half feet and the measurement from the part of the conductor still there was about fifteen inches." The deponent further testified that he took photographs. After the deposition had been read and the questions and answers respectively admitted, Mr. Norton offered the photographs in evidence and they were admitted without objection.

It is the contention of the defendant that "the testimony of

the plaintiff that on the day after the accident she pointed out, in the defendant's absence, the place where she fell was self-serving or 'manufactured' evidence, and was therefore incompetent." It is plain the evidence from the plaintiff in this regard was received, as the presiding judge instructed the jury, "solely to identify the spot she fell on," and was admissible for the purpose of laying a foundation for the admission of the photographs which were afterwards admitted in evidence and to connect and make relevant the testimony of the witnesses as to the appearance and conditions of the sidewalk at the place where the plaintiff contended that she had fallen. So considered, her testimony and the testimony of her witnesses were rightly received. *Everson v. Casualty Co. of America*, 208 Mass. 214, 220.

The deponent was then asked, against the objection of the defendant, "Have you noticed the situation as to the conductor since then?" and he answered, "It looks like a new conductor;" and the defendant excepted. The question was a proper question and as such was not subject to exception. The answer was not responsive, and presumably would have been stricken out had the defendant so requested. In the absence of such a motion the exception is a general one and must be overruled, because the question in itself could not be harmful and the answer if harmful was waived. *Burns v. Brier*, 204 Mass. 195, 197.

The defendant admits in her brief that her remaining exceptions were made harmless by the charge of the presiding judge.

It follows that the entry must be exceptions overruled.

So ordered.

JOHN E. BARRY'S CASE.

Essex. March 1, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Workmen's Compensation Act, Amount of compensation.

The left hand of a water boy and tool carrier, employed in a granite quarry and receiving \$7 per week, was crushed and the Industrial Accident Board awarded him \$4.67 per week as for total incapacity. Upon a petition by the insurer

under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, for a review a year after the first award, the Industrial Accident Board adopted findings, made by a single member of the board upon evidence warranting them, that compensation as for total incapacity should cease, that the employee, notwithstanding his injury, had an earning capacity in the labor market of \$3, "did he not have the laudable desire of continuing at school," and that he should receive compensation of \$2.67 a week, which was on the basis that his earning capacity was reduced from \$7 to \$4 a week. The decision was affirmed on an appeal by the employee to the Superior Court. *Held*, that no error of law was apparent on the record.

APPEAL under the workmen's compensation act from a decision of the Industrial Accident Board, entered upon a petition under St. 1911, c. 751, Part III, § 12, as amended by St. 1914, c. 708, § 11, affirming and adopting findings and rulings of a single member of the board that John E. Barry, who, when in the employ of the Cape Ann Granite Company as a water boy and a tool carrier in its granite quarry and fourteen years of age, had suffered injuries which crushed his left hand, for which, under the award being reviewed, he had received \$4.67 per week as compensation for total incapacity from September 10, 1917, to April 18, 1919, should receive thereafter \$2.67 per week as compensation for partial incapacity.

Material findings of the single member of the board, which were adopted by the board, were as follows:

"Upon the evidence in this case I find that this employee is not totally incapacitated for work and that compensation for total incapacity should cease as of this date.

"As to what earning capacity the boy has in the general labor market, this must necessarily be estimated from the appearance of the boy and from one's knowledge of conditions of employment. I find that he is incapacitated for the work which he was doing at the time of his injury, which was that of a tool boy. I believe, however, and find that in the general labor market he has an earning capacity of \$3 a week, which he could avail himself of did he not have the laudable desire of continuing at school.

"I find, therefore, that the employee is entitled to compensation at the rate of \$2.67 per week, two thirds of the difference between his former wages of \$7 and the amount which I find he is now able to earn."

The appeal was heard in the Superior Court by *O'Connell, J.*

and the decision of the Industrial Accident Board was affirmed. The employee appealed.

The case was submitted on briefs.

W. J. Hatch, for the employee.

I. F. Carpenter & L. R. Wentworth, for the insurer.

BRALEY, J. The question for decision is, whether the findings and rulings of the board member, which were adopted and affirmed by the Industrial Accident Board on review, should be reversed. It is contended by the employee that under St. 1911, c. 751, Part II, § 10, as amended by St. 1914, c. 708, § 5, the board erred in deciding that he was not totally incapacitated for work, and that compensation for total incapacity should cease April 18, 1919, and that the evidence is insufficient to support the finding of the board member or of the full board that he was not totally incapacitated on April 18, 1919.

It is undisputed by the insurer that the employee, a boy fourteen years of age, received an injury to his left hand in the course of, and arising out of, his employment. The extent and nature of the injury is fully described in the record, and compensation was properly awarded from September 10, 1917, the eleventh day after the injury, to the date of the first hearing, April 23, 1918, to continue during the period of total incapacity. *Gagnon's Case*, 228 Mass. 334. *Septimo's Case*, 219 Mass. 430. But the evidence at the second hearing, held on April 18, 1919, plainly warranted a finding that the hand had not been rendered permanently incapable of use. It still was a hand the use of which had not been entirely lost. The extent and permanency of the employee's disability was a question of fact, and, the finding being conclusive, the ruling that compensation for total incapacity should cease as of the date of the second hearing was correct. *Amadio's Case*, 233 Mass. 104. *Pass's Case*, 232 Mass. 515. It further appears and the evidence supports the conclusion of the board member, that the employee, notwithstanding the injury, had an earning capacity in the labor market of a weekly wage of \$3, "did he not have the laudable desire of continuing at school." It follows that his earning capacity, although partially impaired, did not amount to a total loss of wage earning power, and he was properly awarded compensation at the rate of \$2.67 a week, being two thirds of the difference between his former weekly wages of \$7,

and \$3, the amount he was able to earn at the date of the second hearing. *Sullivan's Case*, 218 Mass. 141. *Duprey's Case*, 219 Mass. 189. *Lacione's Case*, 227 Mass. 269.

The board reserved the right under St. 1911, c. 751, Part II, § 22, of awarding a lump sum after further consideration, but this reservation forms no part of the decree under which the case is before us.

We find no error of law in the record and the decree must be affirmed.

Ordered accordingly.

COMMONWEALTH vs. ANTONIO J. SZCZEPANEK.

Essex. March 2, 1920. — April 1, 1920.

Present: RUGG. C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Homicide. Practice, Criminal, Election between counts. *Pleading, Criminal*, Indictment. *Evidence, Confession*.

An indictment for murder was in two counts, each count charging the murder of a different individual. Upon motion of the defendant after arraignment and before trial that the district attorney be required to elect on which count the government would go to trial, it appeared that the facts, circumstances and testimony were relevant to prove that both murders were committed by the defendant at substantially the same time with a design and purpose to destroy evidence of the defendant's commission of the crime of larceny at that time. The motion was denied. *Held*, that the defendant had no just complaint because of the denial of his motion.

Upon the trial of an indictment for murder, it appeared in evidence that the defendant when arrested was told by the police officer having him in custody that any statement he made would be used against him, and that later in the day in a police station in another city the defendant, without again being warned, made a confession to the same officer in the presence of other officers. This confession was admitted in evidence. *Held*, that

(1) The facts that the defendant was in custody, and that he was questioned by the officer in the presence of other officers and at the police station, did not conclusively prove that the confession was procured by inducements engendering hope or fear;

(2) Upon the whole evidence no facts were disclosed which justified a contention of the defendant that his confession was not made "freely, voluntarily and without compulsion or inducement of any sort."

A confession made to a person in authority, even though it be induced by the solicitation and inquiry of such person, is *prima facie* voluntary and the person objecting to its admission in evidence must show that it was made under such pressure of hope or fear as to raise a doubt of its accuracy.

INDICTMENT in two counts, found and returned in the county of Essex on January 17, 1918, the first count charging the murder of Annie Spiewak, and the second count charging the murder of Wladyslaw Bill.

After arraignment and before trial the defendant made a motion that the district attorney elect on which count the government would go to trial. The motion was denied.

In the Superior Court the defendant was tried before *Thayer, J.* The material evidence and exceptions of the defendant are described in the opinion.

The jury returned a verdict of murder in the first degree in each count; and the defendant alleged exceptions.

The case was submitted on briefs.

T. S. Herlihy, for the defendant.

H. G. Wells, for the Commonwealth.

PIERCE, J. The defendant was indicted in two counts for murder. The first count charged him with the murder of Annie Spiewak, and the second with the murder of Wladyslaw Bill. He was convicted of murder in the first degree under each count of the indictment. The case is before this court on two exceptions taken by the defendant during the course of the trial. The first exception is to the denial by the trial judge of a motion of the defendant to order the district attorney to elect which count of the indictment he would go to trial on. The second exception is to the admission by the trial judge of an alleged confession by the defendant, at the police station at Newburyport, while he was in the custody of the police.

As to the first exception: In *Carlton v. Commonwealth*, 5 Met. 532, it was said by Shaw, C. J., at page 534: "We think it is common in practice, in this Commonwealth, and especially in the county of Suffolk, to include several distinct substantive offences in the same indictment, where they are of the same general nature, and where the mode of trial and the nature of the punishment are the same. And we see no objection to this course; because it is always competent for the court to order — where there are several counts which might tend to perplex the defendant in his defence — that the prosecutor shall elect on which of the counts he will bring the defendant to trial, so as to exempt him from the vexation of meeting multifarious charges at one

and the same time." To the same effect see *Commonwealth v. Miller*, 150 Mass. 69, 70, and *Commonwealth v. Rosenthal*, 211 Mass. 50.

While the counts in the case at bar charged distinct crimes of murder, the facts, circumstances and testimony were relevant to prove that both felonies were committed by the defendant at substantially the same time with a design and purpose to destroy evidence of the defendant's commission of the crime of larceny at that time. In the circumstances of this case it is plain the defendant could not be vexed in the procedure of his trial or prejudiced by the introduction of the same testimony upon both counts. It follows that he can have no just complaint because of the denial of his motion to order the district attorney to elect which count he would go to trial on.

The second exception is to the admission of the defendant's confession at the police station, in Newburyport, upon the ground that the State police officer, Griffin, having the defendant in custody, did not warn him "that anything he might say would be used against him" until after he had made the damaging admission that he had struck Mrs. Spiewak with the axe. There is no evidence that the defendant made his confession as the result of any inducement, threat or promise which was calculated to excite hope or fear in respect to the proceedings. When arrested at Easthampton the officer "told him that he knew we were police officers; that we wanted to be fair with him; that any statement that he would make we could use it against him." He was asked, "Do you understand?" He said, "Yes." In the presence of an attorney who was retained to represent the defendant at Northampton, he was told "that this was a serious matter and that anything he might say would be used against him." When brought to the Newburyport station he was delivered to the city marshal; the marshal went out with the defendant and shortly returned with him with a roll of money in his hand. Griffin took the roll of money and said to the defendant, without further warning him as to the effect of what he might say, "What do you say now, Tony?" Thereupon the defendant in the presence of the city marshal and four policemen made his confession as to when, how, where and the circumstances attending his getting the money shown him, and the murder of Spiewak and Bill. This confession was reduced to writ-

ing, was read to him, and was signed by him on the first and last pages.

The facts that the defendant was in custody, and that he was questioned by the officer in the presence of other officers and at the police station, do not conclusively prove that the confession was procured by inducements engendering either hope or fear. *Commonwealth v. Storti*, 177 Mass. 339, 343. *Sparf v. United States*, 156 U. S. 51. *Wilson v. United States*, 162 U. S. 613, 623. A confession made to a person in authority, even though it be induced by his solicitation and inquiry, is *prima facie* voluntary and the person objecting to its admission in evidence must show that it was made under such pressure of hope or fear as to raise a doubt of its accuracy. *Commonwealth v. Sego*, 125 Mass. 210, 213. As stated by Chief Justice Shaw in *Commonwealth v. Morey*, 1 Gray, 461, at pages 462 and 463, "The ground on which confessions made by a party accused . . . are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted." While the law is settled in this Commonwealth that a confession otherwise relevant does not become irrelevant because the accused was not warned that he was not bound to make such confession, and that the evidence might be used against him, the fact of such warning is nevertheless important evidence to show the confession was voluntary. *Commonwealth v. Cuffee*, 108 Mass. 285. *Commonwealth v. Smith*, 119 Mass. 305. *Commonwealth v. Preece*, 140 Mass. 276. *Commonwealth v. Robinson*, 165 Mass. 426, 429.

In the case at bar it cannot be assumed that the admonitions of the police officer to the accused at Easthampton and Northampton were not present in the memory and recalled by the accused when his confession was obtained at Newburyport. Upon the whole evidence no facts are disclosed which justify the contention of the defendant that his confession was not made "freely, voluntarily and without compulsion or inducement of any sort." *Wilson v. United States*, *supra*.

Exceptions overruled.

FRANK DEL VISCO vs. GENERAL ELECTRIC COMPANY.

Suffolk. March 3, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, In removing fence. *Witness*, Cross-examination. *Evidence*, Materiality, Competency.

The admissibility of certain questions asked in cross-examination of a former employee of the defendant, who was called as a witness for the plaintiff at the trial of an action of tort for personal injuries alleged to have been caused by the negligence of the defendant in removing an iron fence, was *held* to have been within the discretion of the trial judge.

In the same action it was *held* that cross-examination of the defendant's foreman, who was called as a witness for the defendant, to elicit the reasons why a former employee of the defendant, who had testified for the plaintiff, had been discharged, was wholly within the discretion of the trial judge.

At the trial of an action of tort for personal injuries resulting from the fall of an iron fence and alleged to have been caused by the negligence of the defendant in leaving the fence in a dangerous condition while in process of removing it, the defendant is entitled to show that the fall of the fence happened, not through his negligence but because of the acts of others who unlawfully climbed on or loosened or interfered with it, causing it to topple over, and inquiry of witnesses tending to prove that contention is admissible in evidence.

TORT for personal injuries resulting from the falling of an iron fence alleged to have been left in a dangerous condition by the defendant while it was being taken down and removed. Writ dated March 1, 1918.

In the Superior Court the case was tried before *Hitchcock, J.* Material evidence and exceptions saved by the plaintiff are described in the opinion. There was a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. Mansfield, for the plaintiff.

E. S. Underwood, for the defendant.

BRALEY, J. The action is in tort for personal injuries alleged to have been caused by the negligence of the defendant, and, the jury having returned a verdict for the company, the case is here on the plaintiff's exceptions to the exclusion and admission of evidence.

It appears and the jury could find on the evidence of the plain-

tiff's witnesses, that the defendant "had certain land and buildings" bounded on one side by a street and on another side by a large vacant lot not being the property of the defendant, but "used by the general public as a playing-ground and dump." A fence constructed in sections set between concrete posts with a top and bottom rail of angle iron, and "three quarters inch iron pickets inserted through holes drilled in the rails," ran between the defendant's premises and the lot. The defendant's employees had been engaged for about two days before the accident in removing the fence. The nuts had been oiled, loosened and then turned back "hand tight," so that they could easily be removed. When this had been done the fence was taken down by the workmen in sections, and as each section was freed it was carried away. The removal under this method proceeded until four o'clock in the afternoon of the day of the accident when the workmen began to remove "all the nuts and bolts from the remaining sections" and at five o'clock when they ceased work, "several sections of the fence" were left "without either nuts or bolts to keep them in place." The plaintiff, a boy seven years of age, testified, that while on the vacant lot he sat down about five feet distant from, and with his back toward the fence, when "the fence fell on him and injured his head." It was contended by the plaintiff that the section which fell had been left by the workmen in a dangerous condition, and that "it fell without being interfered with." The defendant, on the other hand, contended, that the fence would not have fallen unless the boys who were with the plaintiff, or "some one not authorized to do so removed the nuts and bolts after" its "employees ceased work."

We take up the exceptions in the order presented by the record.

The question asked in cross-examination of one Marra, a former employee of the defendant, called as a witness by the plaintiff, "You left the fence that night so that it would stand all right unless somebody pulled it down, didn't you?" and the answer, "Well, if the wind blowed hard it might fall down," were permissible within the discretion of the presiding judge. *Jennings v. Rooney*, 183 Mass. 577. The defendant's foreman was properly allowed to testify that on the day of the accident there were "some boys there most of the time," and that "We would drive them off

the premises," as well as to state that boys had been driven off the fence upon which they were climbing, and that the boys had been told "to get off the premises." It also was relevant to ask "Was the fact of boys being about there one of the reasons for doing away with the nuts and bolts as you have described;" and to the answer, "We put the nuts and the bolts on the top rail for safety's sake," no exception was saved. The defendant was entitled to show that the fall of the fence happened not through its negligence but because of the acts of others who unlawfully climbed on, or loosened, or interfered with the fence causing the section in question to topple over. *Barber v. C. W. H. Moulton Ladder Co.* 231 Mass. 507. *Donahoe v. New York & New England Railroad*, 159 Mass. 125. The question, "Were the pickets run through holes drilled in the iron" was merely descriptive of the construction of the fence, and for that purpose it was admissible, no objection to the form of the question having been specifically taken. *Gagnon v. Sperry & Hutchinson Co.* 206 Mass. 547. The cross-examination of the defendant's witness Chick to elicit the reasons why he had discharged Marra was wholly within the discretion of the court, and the ruling excluding the question, "Why did you discharge this man Marra, who testified?" presents no error of law. *Jennings v. Rooney, supra*. The question in direct examination to the police officer called by the defendant, and who had been familiar with the premises, and observed the conduct of the boys while the fence was being removed on the day in question, "What had you observed as to whether boys were upon or about that fence?" has become immaterial because the answer was finally excluded. The next question to this witness was, "What had you observed the children doing about that fence?" to which he answered, "Well, they were running in through," and "On that very day I drove children off the little shed the General Electric had built when they were taking down the fence." The plaintiff excepted to the question and asked that the answer be stricken out, and excepted to the ruling of the court, that "The answer may stand." The next question also excepted to was, "Were those sheds on the property?" answer, "Yes, sir." The evidence of the defendant's witness, one Rome, that on the day the fence was being taken down, "I see many times dozens of times, three or more boys take hold of the fence, and shaking him up," to which exceptions also were saved, is of a

like character. We are of opinion that this line of inquiry, not being too remote, tended to support the contention that the fence fell because of children climbing on or playing with it, and that if left undisturbed by them the accident would not have happened. *Commonwealth v. Billings*, 97 Mass. 405.

The plaintiff, on whom the burden rests, having failed to show that he has been aggrieved, the exceptions must be overruled. *Zamore v. Boston Elevated Railway*, 198 Mass. 594, 597.

So ordered.

EMPIRE STATE PICKLING COMPANY vs. EMPIRE GROCERY
COMPANY.

Suffolk. March 9, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Contract, Modification, Performance and breach.

At the trial in the Municipal Court of the City of Boston of an action of contract to recover the contract price of a quantity of sauerkraut, there was evidence that, by a contract in writing dated February 11 of a certain year, the plaintiff agreed to sell and the defendant to purchase one hundred barrels of sauerkraut "F. O. B. Phelps," "to be ordered out" by the defendant between the next October 1 and November 30; that the kraut was ready for delivery, but was not ordered out and was not delivered; that on the next January 2, the kraut was barrelled and placed in storage by the plaintiff for the defendant's account and the defendant was notified; that on January 4 the defendant wrote the plaintiff requesting that no shipment of the kraut be made and to "Hold goods in your storage until we advise you further," and that the plaintiff on January 6 wrote the defendant agreeing to do so. On March 15, in reply to the plaintiff's request for information as to when the kraut would be ordered out, the defendant wrote the plaintiff that it could not use the kraut and to make no shipment. The trial judge found "that title passed" and found for the plaintiff. *Held*, that

(1) The evidence warranted the findings;

(2) Although, under the contract, title would not have passed until the sauerkraut was delivered "F. O. B. Phelps," the proposal of the defendant made on January 4, that the plaintiff should "Hold goods in your storage until we advise you further" and the acceptance by the plaintiff of this proposal on January 6, operated as waivers of the obligation of the defendant to order out, and of the plaintiff to make delivery "F. O. B. Phelps" as a condition of the passing of title;

(3) The defendant was obligated under St. 1908, c. 237, § 51, to pay the contract price and the storage and insurance charges.

CONTRACT, with a declaration in two counts, the first count being for alleged breach of a contract in writing dated February 11, 1918, whereby the plaintiff agreed to sell and the defendant to purchase one hundred barrels of sauerkraut "F. O. B. Phelps," "To be ordered out between October 1, 1918, and November 30, 1918." The second count was upon an account annexed for the purchase price of the sauerkraut, storage, insurance and interest. Writ in the Municipal Court of the City of Boston dated March 25, 1919.

The material facts appearing at the hearing in the Municipal Court are described in the opinion. At the close of the evidence the defendant asked for the following rulings:

"1. Upon all the evidence the court must find for the defendant on the first count.

"2. Upon all the evidence the court must find for the defendant on the second count.

"3. There is not sufficient evidence to warrant the court in finding that title to the goods ever passed to the defendant.

"4. The plaintiff can recover, if at all, only damages for breach of contract sued upon.

"5. The measure of damages is the difference between the contract price of the goods and the market value of same at the time of breach.

"6. There is not sufficient evidence in this case to warrant a finding of any more than nominal damages in respect to the first item in the account annexed to the plaintiff's declaration."

"8. The plaintiff cannot recover the cost of insuring the goods.

"9. The plaintiff cannot recover the cost of storing the goods."

"11. The measure of damages, if any, must be fixed as of the date of expiration of the contract sued upon.

"12. Upon all the evidence the plaintiff can recover, if at all, only nominal damages.

"13. The plaintiff was bound to have used all reasonable means of mitigating the damages.

"14. On the pleadings and on the evidence, the plaintiff cannot recover on the first count.

"15. On the pleadings and on the evidence, the plaintiff cannot recover on the second count.

"16. On the pleadings and on the evidence, the plaintiff can recover only nominal damages on the first count.

"17. On the pleadings and on the evidence, the plaintiff can recover only nominal damages on the second count."

The trial judge refused to rule as requested, found "that title passed" and found for the plaintiff and, at the defendant's request, reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

St. 1908, c. 237, § 51, referred to in the opinion, is as follows: "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods."

S. T. Lakson, for the defendant.

R. S. Wilkins, for the plaintiff.

PIERCE, J. This is an action of contract, before this court on appeal from an order of the Appellate Division of the Municipal Court of the City of Boston dismissing a report of the trial judge of that court. The material evidence introduced at the trial tended to prove that on February 11, 1918, the plaintiff and the defendant entered into a written contract in Boston, for the purchase and sale of a quantity of sauerkraut. The goods were not in stock, were to be manufactured by the plaintiff, were to be "ordered out" between October 1, 1918, and November 30, 1918, were to be delivered "F. O. B. Phelps, no freight allowance," and were to be paid for at the agreed price at the option of the purchaser on the terms of a discount for cash in ten days or net thirty days from the date of shipment.

The plaintiff manufactured the kraut and had it in vats ready to be packed in barrels for delivery "F. O. B. Phelps" before October 1, 1918, and held it ready for delivery between October 1, 1918, and November 30, 1918, when it should be "ordered out" by the defendant. On November 5, 1918, the plaintiff wrote to the defendant calling its attention to the provision in the contract that the casks of kraut were to be "ordered out" prior to November 30, 1918, and, stating they would like "to ship them immediately," asked for "shipping instructions." On December 14, 1918, the plaintiff in a letter again asked the defendant for shipping instructions, and stated that "unless we receive shipping instructions

from you by return mail, we shall place these goods in storage for your account. The storage charges will be 10c. per cask per month or fraction of month. We will have these goods insured in your name at the contract price, and will send you a bill for the insurance premium. We will send you a bill also for the kraut on the day the same goes in storage, and said bills will all mature thirty days from that date, and we shall expect payment at that time." On December 18, 1918, the defendant wrote the plaintiff, ". . . Replying to your letter of December 14th, on account of absence of the gentleman who takes charge of the kraut, we cannot give you any definite answer. We expect the gentleman will be in the office next week. He will take it up direct with you." On December 20, 1918, in reply the plaintiff wrote the defendant a letter wherein it refused a request by the defendant that it should make an offer to cancel the contract of the defendant, and concluded by saying "We shall be pleased to have you advise us in accordance with your letter, as soon as the gentleman whom you speak of, returns to your office."

On January 2, 1919, the plaintiff packed the kraut in barrels which it had on hand, put them in storage in the defendant's name, and marked them "54" in pursuance of an intention of its secretary "to set them aside as the goods contracted for." On January 4, 1919, the plaintiff wrote to the defendant that the goods had been put in storage, and enclosed invoices for the contract price and for one month's storage. On the same day, January 4, 1919, the defendant wrote the plaintiff: "Replying to your letters of December 14th and 20th, please do not make shipment of kraut as per your letters. Hold goods in your storage until we advise you further." On January 6, 1919, the plaintiff wrote to the defendant and agreed to hold the kraut in storage. On February 20, 1919, the plaintiff wrote to the defendant inquiring when the goods were to be ordered out. On March 15, 1919, the defendant wrote "This letter is in reference to your letter of March 13th as well as previous correspondence regarding the matter of sauerkraut. We cannot possibly use the sauerkraut and must advise you now not to make any shipments whatever of sauerkraut to us." There does not appear to have been a letter of March 13.

The trial judge of the Municipal Court "found 'that title passed' and found for the plaintiff." We are of opinion the evi-

dence warranted the finding. The agreement of the plaintiff was to deliver the goods "F. O. B. Phelps," between October 1, 1918, and November 30, 1918, when ordered out by the defendant. The agreement of the defendant was to order out the goods within the period named for so doing, and after their delivery at the railroad to pay for them within thirty days. The goods were not ordered out, nor were they delivered, although they were ready for delivery when ordered out. After November 30, 1918, both parties to the contract treated it as remaining in force until it was repudiated on March 15, 1919, by the above letter of the defendant. While the title to the goods under the agreement would not pass to the defendant until the goods were delivered "F. O. B. Phelps," we are of opinion that the evidence warranted a finding that it did pass on January 6, 1919, when the plaintiff accepted the proposal of the defendant, made January 4, 1919, that the plaintiff should "Hold goods in your storage until we advise you further," — the proposal and acceptance operating as waivers of the obligation of the defendant to order out and of the plaintiff to make delivery "F. O. B. Phelps," as a condition of the passing of title. *Weld v. Came*, 98 Mass. 152. It follows that the defendant was obligated to pay the contract price and the storage and insurance charges under St. 1908, c. 237, § 51.

The requests for rulings so far as they are not covered by this opinion have all been considered; they are not argued, and are treated as waived.

Order affirmed.

HELEN L. FLAHERTY vs. BOSTON ELEVATED RAILWAY
COMPANY.

Suffolk. March 9, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Practice, Civil, Ordering verdict. *Negligence*, Street railway.

Where the evidence at a trial does not warrant a verdict for the plaintiff, the trial judge, after the return of a verdict for the plaintiff but before it has been affirmed and recorded, may order a verdict entered and recorded for the defendant.

At the trial of an action against a street railway company in a city by a passenger upon one of its open cars for injuries resulting from contact with a chemical solution which had been used by firemen of the city fire department to extinguish a fire on an overhead structure of the defendant, there was evidence that the plaintiff was seated on the front seat of the car next the motorman, that the car was stopped by an inspector of the defendant before reaching the point of the fire and that the motorman after a few minutes by order of the inspector proceeded with the car, and that drops of the solution came in at the front of the car and fell upon the plaintiff. There also was evidence that, "while the car was going up the street," the firemen were playing the solution upon the overhead structure but stopped before the car came to a standstill, that the solution was dripping from the structure and looked like water. There was no evidence that either the inspector or the motorman knew or had reason to know the injurious qualities of the solution. *Held*, that

(1) The evidence fully warranted the jury in finding that the plaintiff was in the exercise of due care in remaining in her seat during the time the car was at a standstill and when it moved;

(2) In the absence of knowledge that contact with the solution probably would cause harm to a person, neither the inspector nor the motorman was negligent in ordering the car forward or in going ahead with it although drops of the liquid had not entirely ceased to fall from the structure.

TORT for personal injuries resulting to the plaintiff, while a passenger on an open street car of the defendant, from the dripping upon her of a chemical solution which had been used in extinguishing a fire on the overhead structure of the defendant by firemen of the city of Boston fire department. Writ dated June 16, 1916.

In the Superior Court the action was tried before *J. F. Brown, J.* The material evidence is described in the opinion. The jury returned a verdict for the plaintiff. The judge refused to accept it, ordered a verdict for the defendant and reported the case for determination by this court with the stipulation that, if the action should have been submitted to the jury, judgment in favor of the plaintiff should be entered in the sum of \$175 with interest and costs; otherwise, that the verdict for the defendant was to stand.

A. A. Sifton, for the plaintiff.

E. P. Saltonstall, (*L. Saltonstall* with him,) for the defendant.

PIERCE, J. This is an action of tort for injuries sustained by the plaintiff on May 11, 1916, at about 5:54 P.M., while she was a passenger on an outbound open car of the defendant on Washington Street at Savoy Street. No question is raised as to the sufficiency of the pleadings. The presiding judge at the close of the trial in the Superior Court refused to accept a

verdict for the plaintiff and ordered the jury to return a verdict for the defendant, which was done, and the plaintiff's exceptions were duly saved.

Assuming, as we must in the silence of the record, that the first verdict of the jury, for the plaintiff, was not affirmed and recorded before the judge had ordered a verdict for the defendant, it follows that the judge acted within his right, and that the only question of law saved by the plaintiff's exceptions is whether any aspect of the evidence required that the plaintiff's case should be submitted to the jury. See *Byrne v. Boston Elevated Railway*, 198 Mass. 444, 451; *Hatch v. Boston & Northern Street Railway*, 205 Mass. 410; *James v. Boston Elevated Railway*, 213 Mass. 424.

The evidence in its aspect most favorable to the contention of the plaintiff warranted the jury in finding that the plaintiff, as a passenger, was seated on the front seat on an open car of the defendant as it proceeded along Washington Street, Boston; that she retained her seat while the car was stopped for five or ten minutes at Savoy Street by the motorman, at the order of a man with a blue uniform and a hat on which was a brass plate inscribed with the word "Inspector," and continued to occupy the same seat when the motorman, ordered by the same person who had ordered that the car be stopped, sent the car ahead "at a pretty quick speed;" that, shortly before the car on which the plaintiff was a passenger arrived at Savoy Street, there had been a fire on the elevated structure of the Boston Elevated Railway Company near Savoy Street, which had been extinguished by a chemical solution of bicarbonate of soda, water and vitriol, passed through three hundred and fifty feet of hose of the city of Boston fire department; that the firemen played the hose of the chemical engine on the elevated structure "while the car was going up the street," but stopped "playing" and were winding up the hose before the car came to a standstill; that the "structure or the overhead iron work was dripping the way it would after a rain storm;" that the car remained stopped five or ten minutes; that the "man with a blue uniform with the word 'Inspector' on his hat" beckoned the motorman to go ahead; that in response to the signal the motorman started the car and went ahead after sounding his gong, "quick;" that the motion of the car and the wind from the outside forced the drops as they fell into the front of the car in the form of a spray, which looked like

water and came in through the front of the car and injured the eyes and dress of the plaintiff.

The evidence would fully warrant the jury in finding that the plaintiff was in the exercise of due care in remaining in her seat during the time the car was at a standstill and when it moved. The falling drops had to her the appearance of water or of a white liquid, and so far as the evidence discloses she had no knowledge of their chemical composition.

And the evidence was entirely inadequate to warrant a finding that the motorman or inspector was negligent. The chemical engine was in charge of and operated by firemen of the fire department of the city of Boston. The record discloses no facts to justify the inference that either the inspector or the motorman knew or should have known that the liquid used by the fire department in extinguishing fires with chemical engines would probably cause harm of some kind and degree to some person whom it should strike or envelop, unless active measures were taken to guard and protect such a person from its contact. In the absence of such knowledge, it was not negligent to order the car forward or to go ahead with it although drops of liquid had not entirely ceased to fall from the structure.

It follows by the terms of the report that "the verdict for the defendant is to stand."

So ordered.

ISIDOR BERNSTEIN & others vs. W. B. MANUFACTURING COMPANY.

Suffolk. March 10, 1920. — April 1, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Contract, Construction. Words, "Sometimes."

In a contract for the sale of wash suits, providing for "deliveries to be made about January 15, 1919," and containing a clause, "All orders accepted to be delivered to the best of our ability, but will under no circumstances hold ourselves liable for failure to deliver any portion of orders taken, sometimes caused by circumstances over which we have no control," the word "sometimes" should be interpreted to mean "now and then," "occasionally," "if at any time," and, so interpreted, the clause imposed upon the seller a binding obligation to make

deliveries to the best of his ability at the time specified in the agreement unless he was prevented by causes for which he was not responsible and over which he had no control.

CONTRACT upon a declaration in two counts, the first count being upon an account annexed for \$875.50 for seventy-two dozen wash suits, and the second count being for damages for breach of a contract made on July 13, 1918, whereby the plaintiffs agreed to sell and the defendant to purchase one hundred and fifty-two dozen wash suits. Writ dated March 15, 1919.

In the Superior Court the case was tried before *Morton, J.* The material evidence is described in the opinion. At the conclusion of the plaintiffs' evidence, the judge, upon motion of the defendant, for the reason quoted in the opinion, ruled that there was no binding contract between the parties and ordered a verdict for the defendant; and at the request of the parties reported the case for determination by this court, judgment to be entered for the defendant if his ruling was right; and, if his ruling was wrong, a new trial to be ordered.

G. V. Phipps, for the plaintiffs.

J. B. Jacobs, for the defendant.

PIERCE, J. The defendant placed an order with the plaintiffs on July 13, 1918, for one hundred and fifty-two dozen wash suits of various styles and sizes, and five suits of each style number as samples; deliveries to be made about January 15, 1919, samples at once. On August 20, 1918, the plaintiffs delivered to the defendant the five sample suits of each style number mentioned in the order, and were paid by the defendant for the same on December 9, 1918. On December 16, 1918, the plaintiffs shipped to the defendant seventy-two dozen suits. Upon receipt of this shipment the defendant wrote the plaintiffs that it did not want the goods delivered before March 15, 1919. Letters were exchanged between the parties with reference to the time of delivery and manner of payment, and not reaching any agreement, on January 10, 1919, the defendant returned to the plaintiffs the seventy-two dozen suits which had been shipped to it in December, and cancelled the balance of the order in accordance with the following letter, dated January 10, 1919: "Gentlemen: We have looked over the lot of Wash Suits that you sent us and we find them unsatisfactory, and therefore can not use them. We are shipping these

back to you, also cancel any other numbers that you intend sending us."

The plaintiffs brought an action against the defendant by a writ which issued from the Superior Court on March 15, 1919. The declaration is in two counts, the first being a common count of debt for the contract value of the seventy-two dozen suits shipped to and returned by the defendant; and the second, a count for damages for the cancellation of its order and for its refusal to receive any of the goods thereunder. The plaintiffs offered evidence of the sale by auction of the suits included in the order, and of its damages. At the conclusion of the plaintiffs' case, the defendant moved for a verdict for the defendant on the ground that the clause contained in the order blank of the plaintiffs, which read, "'All orders accepted to be delivered to the best of our ability, but will under no circumstances hold ourselves liable for failure to deliver any portion of orders taken, sometimes caused by circumstances over which we have no control,' imposed no obligation upon the plaintiffs to make delivery, and that the contract was therefore void for lack of mutuality." The presiding judge "ruled that there was no binding contract between the parties, as, by the clause above referred to, there was no obligation upon the part of the plaintiffs," and ordered a verdict for the defendant; and at the request of the parties reported the case to this court upon the following terms: "If my ruling was right, judgment to be entered for the defendant; if my ruling was wrong, a new trial to be ordered."

It is the contention of the defendant that "the plaintiffs had the absolute discretion as to whether they should deliver the merchandise or not, and the defendant could not have called upon the plaintiffs for the delivery of the whole or any part of his order." The defendant's position rests upon the generally accepted legal maxim that in a bilateral agreement both the mutual promises must be binding or neither will be, for if one of the promises is for any reason invalid, of course the other has no consideration, and so they both fall. Langdell, *Law of Contracts*, § 82. *Harrison v. Cage*, 5 Mod. 411. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.* 114 Fed. Rep. 77. *Velie Motor Car Co. v. Kopmeier Motor Car Co.* 194 Fed. Rep. 324. *American Agricultural Chemical Co. v. Kennedy & Crawford*, 103 Va. 171. *Frothingham v. Seymour*, 118 Mass. 489, 494.

The offer and the acceptance in the case at bar being bilateral agreements, the question presented by the ruling is whether the clause contained in the order blank imposed upon the plaintiffs any detrimental obligation. We interpret the word "sometimes" in the clause to mean "now and then," "occasionally," "if at any time." So construed and read in its place, with the remainder of the clause, it means that performance of the agreement by the plaintiffs was not left optional with them, but was an absolute binding obligation to make deliveries to the best of their ability at the time specified in the agreement unless they were prevented from making such deliveries by causes for which the plaintiffs were not responsible and over which they had no control. It follows that the ruling was wrong, and by the terms of the report a new trial is to be ordered.

So ordered.

JOHN D. W. BODFISH, executor, vs. GEORGE N. CROSS & others.

Barnstable. March 3, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Evidence, Declaration by deceased person. Practice, Civil, Preliminary examination by judge as to evidence of declaration by deceased person.

At the trial of issues relating to whether a will was executed by a testator of sound mind or was procured to be executed by undue influence, evidence was offered by the appellant of a declaration by a deceased person of a statement made to him by the testator, which declaration would have been admissible in evidence under R. L. c. 175, § 66, if the judge had found that it was made in good faith and upon the personal knowledge of the declarant. At the preliminary hearing by the judge, required by the statute, no evidence was produced although the judge suggested that it should be, and the judge, while stating that he was willing to assume that the deceased person made the declaration, also stated, "Beyond that I am not satisfied," and excluded the evidence subject to an exception by the appellant. *Held*, that, because the judge did not find that the statement of the deceased person was made in good faith, and his action could not be said to be unjustifiable, the exception must be overruled.

APPEAL from a decree of the Probate Court for the county of Barnstable allowing the will of William P. Cross, late of Sandwich, with two codicils.

Issues relating to the execution of the instruments, to the soundness of mind of the testator when he executed them, and to whether their execution was procured by undue influence of Semira D. Ellis, his wife Lelia M. Ellis, and John D. W. Bodfish, or any of them, were framed in the Supreme Judicial Court and were sent to the Superior Court for trial by jury. There was a trial before *Raymond, J.*, when the issues as to the soundness of mind of the testator and as to whether the execution of the instruments was procured by undue influence were answered unfavorably to the appellee, and, on his motion, the findings of the jury were set aside and a new trial was ordered.

The second trial was before *Cox, J.* A single exception was saved by the appellants and is described in the opinion. Material portions of the colloquy between the trial judge and counsel for the appellants relating to the ruling excluding the evidence described in the opinion were as follows:

The appellants' counsel: "The respondents offer to show by the witness, a declaration made to her, made by her deceased brother, that William P. Cross, the testator, told her brother to tell sister 'I would like to come and see her, but the Ellises will not let me.'"

The judge: "I am excluding this on the ground that I am not satisfied that it is made of the personal knowledge of the declarant."

The appellants' counsel: "Your Honor excluded it on the ground that it is not made personal knowledge in the first or second degree, so to speak?"

The judge: "... I should be satisfied that the brother said this to her, of course. . . . I will assume that, that her brother made the statement."

The appellants' counsel: "And you exclude it?"

The judge: "Yes."

The appellants' counsel: "Does that cover the ground?"

The judge: "It covers it as far as I am inclined to go, unless you satisfy me of something else."

The appellants' counsel: "Whether your Honor would say that you are satisfied of the truth of the statement of the brother?"

The judge: "No; you have gone that far. I told you that I didn't feel that I ought to — that I would not admit the evidence as it stood, and you made your offer of proof. I go so far as to say

now that I am willing to assume and will assume that she will testify, and I will find, that her brother made this statement. Beyond that I am not satisfied."

The appellants' counsel: "I don't think that quite reserves—"

The judge: "Then you have got to put the questions. There has got to be some evidence. I have gone beyond the evidence now. I am assuming a good deal, for the purpose of saving your rights."

The appellants' counsel: "I had the impression that the matter of the truth of the declaration goes to the question in this case, would go to the question as to whether your Honor was satisfied that Cross made the declaration to the brother."

The judge: "That is the only thing you claim; you claim that if he made that declaration in good faith, that is all you need, don't you?"

The appellants' counsel: "Yes."

The judge: "I am willing to admit that he made that declaration."

The appellants' counsel: "As to whether you are satisfied as to the truth of the declaration, that is, that Cross made the declaration?"

The judge: "How can I do that, when there has been no opportunity, no testimony upon the point?"

The appellants' counsel: "I am offering to show that, your Honor."

The judge: "You are offering to show a statement. Now, the circumstances under which the statements were given do not appear. Counsel on the other side has the right to cross-examine upon that; I have a right to ask questions on that, and I intimated that to you, that I was n't satisfied as it then stood. You thereupon make your offer of proof. I take it as offered. If you want to ask her questions, go ahead, but I can't assume things too much."

The appellants' counsel: "Very well, I will leave it as it is."

The jury answered the issues favorably to the appellee; and the appellants alleged exceptions.

A. F. Barker, for the appellants.

W. Welsh, for the appellee.

JENNEY, J. The only question is, whether there was error in the exclusion of declarations made by a deceased person and offered in evidence under R. L. c. 175, § 66.

During the trial of issues involving the soundness of mind of the alleged testator, and undue influence alleged to have been exercised upon him by Semira D. Ellis, Lelia M. Ellis, and John D. W. Bodfish in procuring the execution of a will and codicils, Harriet A. Fish was examined concerning a statement, which, it was contended, had been made to her by her brother, Roland J. Green, who had died in the lifetime of the testator. An offer of proof was made that the brother had said to the witness that the testator had asked him to tell her that he would like "to come and see her, but the Ellises will not let" him.

If the brother had been living and had been a witness, his evidence to that effect clearly would have been admissible, the statement having been made within the period to which testimony had been limited by the judge. There had been introduced evidence of impaired mental condition and undue influence by Semira D. Ellis and Lelia M. Ellis, sufficient to furnish a basis for the admission of the statement.

The statute requires a preliminary finding by the court, that the declaration offered "was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

The presiding judge, who excluded the evidence, found, at the preliminary hearing required by the statute, that the deceased brother made the statement to the witness, and said: "Beyond that I am not satisfied." He did not find that the statement was made in good faith. On the record, this action cannot be said to be unjustifiable, and therefore it is not reviewable. *McSweeney v. Edison Electric Illuminating Co.* 228 Mass. 563. In the absence of such finding, the evidence was properly excluded. *Slotofski v. Boston Elevated Railway*, 215 Mass. 318.

Exceptions overruled.

DANIEL LEARY vs. NEW YORK CENTRAL RAILROAD COMPANY.

Suffolk. March 8, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNET, JJ.

Negligence, Employer's liability.

At the trial of an action against a railroad corporation by an employee under the federal employers' liability act for personal injuries received when helping to unload a motor car from a platform, built above two other motor cars also being transported in a freight car ordinarily used for transporting coal, and six inches below the top of the sides of the freight car, there was evidence that the unloading was being done under the direction of a foreman by means of a derrick, separate ropes being attached to the front wheels and to the rear wheels of the motor car; that the plaintiff with a companion was stationed at the front wheels as the motor car was lifted; that the plaintiff knew that the rope attached to the rear wheels was longer than that attached to the front wheels, that consequently the front end would be drawn up before the rear wheels had left the platform, and that the front end would have to be pulled down by him and his companion to balance the motor car if it was to pass over the sides of the freight car, and that, when the rear end was lifted and free from contact with the side of the freight car, the motor car would swing as pulled by the rope of the derrick; that the plaintiff did not know how much longer the rope attached to the rear wheels of the motor car was than that attached to the forward wheels; that it was from a foot and a half to two feet longer; that, upon an order to hoist being given by the foreman and some one calling out that the rear rope was slack, the plaintiff called, "Wait until I have a look," but the foreman replied, "No wait . . . push the machine over. . . . Push it over quick too;" that the motor car accordingly was hoisted, the plaintiff and his companion pushing down on the forward end to balance it, and that when the rear end cleared the side of the freight car, it fell from a foot and a half to two feet with a jerk, throwing and injuring the plaintiff. *Held*, that

(1) It could not be said as a matter of law that the risk of harm from the drop of the rear end of the motor car was obvious and was assumed by the plaintiff as an incident to his employment;

(2) A finding was warranted that the foreman was negligent in insisting upon the car being hoisted before the plaintiff could "have a look" at the slack rear rope.

TORT for personal injuries received by the plaintiff while in the employ of the defendant, the declaration as amended containing four counts, of which only the fourth, based on the federal employers' liability act, (U. S. Sts. at Large, c. 149, as amended by U. S. St. 1910, c. 143,) was submitted to the jury. Writ dated December 14, 1917.

In the Superior Court the action was tried before *Keating, J.* The material evidence and rulings of the judge to which the defendant excepted are described in the opinion. There was a verdict for the plaintiff in the sum of \$5,250; and the defendant alleged exceptions.

L. A. Mayberry, (W. F. Lewis with him,) for the defendant.

J. J. O'Hare, for the plaintiff.

PIERCE, J. This is an action of tort based upon the federal employers' liability act, in which the plaintiff seeks to recover damages for injuries received while in the employ of the defendant as a laborer.

It was agreed by both parties that the defendant was and is a railroad corporation engaged in interstate commerce within the meaning of the federal employers' liability act, at the time of the accident and that the plaintiff was in fact employed in interstate commerce at the time of the injury within the meaning of that act. At the close of all the evidence the defendant, among other motions, moved that a verdict be ordered for the defendant and requested the judge to rule and instruct the jury that the evidence was not sufficient to entitle the plaintiff to a verdict, and that upon all the evidence the plaintiff assumed the risk of injury in the manner in which his injury was sustained. The motion was denied and the rulings and requests for instructions were refused. The defendant excepted and the case is before this court on the exception after a verdict for the plaintiff. The evidence warranted the finding of the following facts:

On February 8, 1912, a gondola car, which is a freight car commonly used for transporting coal with high sides but no top arrived at the Huntington Avenue yard of the defendant in Boston. It was loaded with three automobiles, two on the floor and a third on a platform above the other two. A witness for the plaintiff testified, "There were two automobiles loaded in the freight car right on the floor of the freight car, and the third one was raised on a platform above the other two, so as to get the third car, the third automobile, into the car. You see they were too long to go into the car all on the floor, so that is to raise one of them up above the other two to get them in. They put a timber up on the side of the car and then put joists across the car on those timbers and make a platform so as to set the third automobile on

that platform." The plaintiff testified that "it, [the platform] was a square — like a square frame built just the width of the automobile, that the aft — I call it the aft wheels, both side wheels resting on a single plank. There was a brace running across the both ends of it; I do not know whether there was two braces or not; but there was one, probably about three by four or four by four, I could not tell, but they were braced at the end." The bottom of the wheels as they rested on the planks were six inches below the top of the side of the car.

The freight car was unloaded about 7 A.M. on February 10, 1917, in the following manner: The car was placed opposite a stationary derrick. "Ropes were tied at the forward — two ropes on each of the forward, one rope on both forward wheels and brought up to a hook in the middle and they were tied up to the derrick chain, the hook that is hitched on to the derrick; there was also a rope tied on the hind wheels and brought up to a hook in the derrick in the same way." There was evidence that the ropes attached to the hind wheels were a foot and a half, perhaps two feet longer than those fastened to the front wheels. The plaintiff was not present when the ropes were tied. He and one Davey were one hundred yards away coming back from the hay shed after leaving some lumber there. Their foreman, Moore, at the car said to them, "You men come over here and give a hand and get this car off." Moore sent Davey to the derrick and the plaintiff into the freight car. Davey took his position at the derrick and the plaintiff on the platform at the front right hand corner of the automobile.

The plaintiff testified in substance that he had never had any experience with tying automobiles; that he never had unloaded an automobile from a coal car before; that he had never had any mechanical experience; that he had used the stationary derrick for unloading lumber and one thing and another, and that the ropes were all fixed when he was called into the car.

A start was made to hoist the automobile. "Somebody sung out that the rope was slack on the hind part of the machine." Moore told Davey "to hoist away." Davey replied, "Is it all right?" Moore answered, "Yes." The plaintiff said: "Wait until I have a look." Moore answered, "No wait, . . . push the machine over. I am foreman of this job. Do as I tell you.

Push it over quick too." Davey testified, "Tom Moore told me for to hoist the car — the automobile. I gave the crank a twist twice around and somebody hollered that the car was n't going up and I stopped and asked was it all right. 'Yes,' Moore says, 'wind it up,' so I wound it up as far as the car could go — as far as the derrick could take the car." The plaintiff testified "When the machine was hoisted as far as the derrick could hoist it — it was hoisted up as far as the derrick could hoist it . . . the forward part was high and the hind part was low down and the boom of the derrick was swinging to my left and I was at the right hand side and it carried me as they were swinging the derrick, and two men pulling the rope, what they call a guide rope and I was shoving here and Ed. Sherry was shoving there, the next one, and when the machine went over, the rear part went over first next to the car; the wheels got caught at the edge of the car; it was not high enough to clear the edge of the car and Mr. Moore says, 'bear down in front' to Sherry and I, and we did. And we beared down the front, the hind part was coming up even with the front and it went over some way, I do not know which way it went over, but it gave a lurch and it threw me on my side and laid me flat in the car." "When the automobile slewed the automobile hit me and threw me."

Sherry, a witness for the plaintiff, described the incident as follows: "That there was 'perhaps twenty inches space on the planking on each side of the automobile; that the staging upon which the automobile rested was twelve inches lower than the top of the coal car; that he recalled the time when Leary was called by Moore to work on the automobile; that two men went on the crane (derrick), and me and Dan Leary helped to push out the car;' that he and Leary were on the front end of the car; that Leary was on the front right-hand corner of the car and the witness on the front left-hand corner of the car; that witness placed his body up toward the radiator; that he used his shoulder after the automobile came up; that Moore gave them orders to push out the car; that on lifting up the car the hind wheels got caught 'that we were trying to bear down on this end of the car in order to help out to clear the hind wheels, see;' that the hind wheels 'got caught on the way out, going over the coal car;' that they didn't clear the coal car; that the derrick was hoisted as far as possible; that the auto-

mobile was slanted that position [illustrating], and we were trying to bear down as much as we could; that at this time the front part of the automobile was 'twenty inches or so' in the air above the side of the car, while the rear wheels of the automobile were caught in the side of the coal car and the rear end of the automobile was facing cornerwards in the coal car; that 'we bore down as much as we could, see, and they pulled on the guide rope, and in the meantime the automobile cleared the coal car, and the jerk of this automobile brought Mr. Leary along;' that, when the rope on the car went over the coal car the jerk of this when it cleared over — of course this rope stretched and in the meantime he (Leary) fell.' Asked what caused Leary to fall, the witness replied, 'the jerk of the car; the rope;' asked if he knew what caused the car (automobile) to jerk, the witness stated that 'of course it (automobile) did n't come up even, see, and when the weight of this part went over it came even then, kind of, and of course when it cleared over it took him along.'"

It was in evidence that it was possible to have lifted the automobile up evenly; that it was the slack of the rope that caused the car to lurch after it went over the side and that, tied evenly, it could be pulled out without any pushing. The plaintiff further testified in substance that he had lifted lumber from a car by the use of a derrick but never an automobile; that the lumber went up even or uneven according to the way the man was loading it on the car, "he would put it as near the middle of the log of lumber as he could or whatever it may be, and there might be a little sag in it that I would have to bear down to get it over the car."

Upon the warrantable findings of fact the plaintiff maintains that the case was properly submitted to the jury upon the ground that it was legally permissible for them to find that the method of work ordered and directed by the foreman was a negligent method on his part to do or adopt without learning whether it might result in injury to the plaintiff, particularly when his attention was called to the specific source of danger, and an opportunity for inspection was not given to the employee. We are of opinion the evidence did warrant the submission of the issue of negligence to the jury.

The defendant owed no duty to instruct or warn the plaintiff of dangers which were known to him or which were obviously and visibly incidental to the projected plan of work. The plaintiff

knew from his experience that it was not uncommon to so attach the tackle to heavy bodies to be lifted that they went up unevenly. With the use of a derrick he had lifted from freight cars, lumber and other heavy articles which did not go up evenly, sagged, and required of him that he should bear down on the higher end to get the lower end over the side of the car. In the case at bar he knew from the call of the man at the derrick that the rope that ran from the rear of the automobile to the hook of the derrick was slack and he consequently knew that the front of the automobile would be drawn up before the rear end left the platform. He knew that the front end of the car was drawn up as far as the derrick could lift it, which was about twenty inches above the side of the car. He knew that the front end must be pulled down to balance the automobile if it was to pass over the side of the car. He knew when the rear end was lifted and free from contact with the side of the freight car, it would swing as pulled by the rope of the derrick. What the jury could find he did not know of the facts material or essential to his safety, but which he could have known had he been permitted a moment to "have a look" as he requested at the slack rope on the hind part of the machine, was that that rope was a slack rope a foot and a half or two feet longer than the taut rope attached to the front end and that consequently the rear end of the automobile would drop with a jerk the considerable distance of two feet the moment the automobile swung free of contact with the side of the car and was unsupported by the downward pressure of the men at its other end. In these circumstances we think the risk of harm from the drop of the end of the automobile was not an obvious risk assumed by the plaintiff as an incident to his employment. *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 504. *Chesapeake & Ohio Railway v. De Atley*, 241 U. S. 310, 314. *Chicago, Rock Island & Pacific Railway v. Cole*, 251 U. S. 54. *Whalen v. Hugh Nawn Contracting Co.* 217 Mass. 400, 402.

We are also of opinion that the foreman should have known and could be found by the jury to have known that a special danger unknown to the plaintiff attended the method adopted by him of adjusting the ropes to the automobile and that it was negligent for him to order the plaintiff "no wait" until the plaintiff could "have a look" at the slack rope, but to "push the machine over" "push it over quick." *Tinkham v. Everson*, 219 Mass. 164, 167.

Whalen v. Hugh Nawn Contracting Co. 217 Mass. 400. *Hogan v. Pennock*, 216 Mass. 274.

It follows that the case was properly submitted to the jury.

Exceptions overruled.

COMMONWEALTH *vs.* JOHN BROPHY.

Suffolk. March 9, 1920. — April 2, 1920.

Present: RUGG C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Evidence, Relevancy, Remoteness. Bastardy.

At the trial of a complaint under St. 1913, c. 563, charging that the defendant, not being the husband of the complainant, did get her with child on January 13, 1919, there was evidence that the complainant, a minor, had known the defendant since school days, that in October, 1917, the defendant, in the United States Naval Reserve Force, was called to active service in Maine. Fifteen letters and post cards received from the defendant by the complainant between January 7 and July 23, 1918, were admitted in evidence subject to exceptions by the defendant. Many of them were couched in terms of affection and one contained a definite proposal as to sexual relations. There was a quarrel between the defendant and the complainant in August, 1918, and for a time they were not friendly. There was evidence that in December, 1918, they again were intimate and that the defendant then got the complainant with child. *Held*, that the letters were not too distinct in character nor remote in time, and were admissible to establish and characterize the intimacy between the parties.

COMPLAINT, made and sworn to in the Municipal Court of the City of Boston on May 28, 1919, under St. 1913, c. 563, charging that the defendant, not being the husband of the complainant, did get her with child on January 13, 1919.

In the Superior Court, the complaint was tried before *J. F. Brown, J.* Material evidence and exceptions saved by the defendant are described in the opinion. The defendant was found guilty and was adjudged the father of the complainant's child; and the defendant alleged exceptions.

G. Alpert, for the defendant.

H. P. Fielding, Assistant District Attorney, for the Commonwealth.

JENNEY, J. In this proceeding under St. 1913, c. 563, entitled "An Act relative to illegitimate children and their main-

tenance," the defendant's sole exception is to the admission in evidence of letters written by him to the complainant, whom he is charged with begetting with child.

The defendant contends that the letters were inadmissible, "because . . . they were not of sufficient proximity to the act" in question, and because, with one exception, they were not "sufficiently significant in character to afford an inference of the moral condition to be proved."

There was evidence that the complainant, a minor, had known the defendant, also a minor, "since they went to school together," and that "since she had grown up she had gone to places with him." In October, 1917, the defendant, who was then in the United States Naval Reserve Force, was called to active service, and thereafter, for the greater part of the time, was in Maine. The letters and postcards, fifteen in number, to which the defendant objects were written from Maine to the complainant between January 7, 1918, and July 23, 1918. Many of them were couched in terms of affection, and one contained a definite proposal as to sexual relations. Admittedly there was a quarrel in August of 1918, and for a time the defendant and the complainant were not friendly. However, there was evidence that they were again intimate and that the defendant kept company with the complainant in December, 1918, in which month, she testified, the defendant got her with child.

The letters were admissible to establish and characterize the intimacy between the parties, which fact was relevant to the issue. Although, with one exception, they did not contain direct declarations or admission of lascivious intent or act, they were not as matter of law too distinct in character nor remote in time. *Beers v. Jackman*, 103 Mass. 192. *Francis v. Rosa*, 151 Mass. 532. *Negus v. Foote*, 228 Mass. 375.

Exceptions overruled.

MAX BLOUSTEIN vs. FANNIE SHINDLER.

MINNIE BLOUSTEIN vs. SAME.

Suffolk. March 9, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Practice, Civil, Exceptions, Judge's charge.

A judge, who at a trial, subject to an exception by the plaintiff, erroneously had permitted the defendant, in order to impeach testimony of his own witness which tended to show merely that the witness was unable to recall a certain conversation in which he had made statements contradictory to his other testimony, to introduce evidence, offered under R. L. c. 175, § 24, that the witness had had such a conversation, charged the jury in substance that, if they believed the evidence offered in impeachment, then they "just put the testimony of the first witness out of the case. You do not put in the second witness's testimony as affirmative facts or having any probative force." *Held*, that the rights of the plaintiff were protected, and that his exception must be overruled.

TWO ACTIONS OF TORT, the second action being for personal injuries alleged to have been received by the plaintiff and caused by a defective condition of a stairway used in common by the tenants in a house of the defendant where the plaintiff and her husband lived, and the first action being by the husband of the plaintiffs in the second action for consequential damages. Writs dated May 16, 1916.

In the Superior Court, the actions were tried together before Hall, J. The material evidence and exceptions saved by the plaintiffs are described in the opinion. There was a verdict for the defendant; and the plaintiffs alleged exceptions.

R. L. c. 175, § 24, is as follows: "The party who produces a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and, if so, shall be allowed to explain them."

F. R. Mullin, (D. J. O'Connell with him,) for the plaintiffs.

L. Marks & J. Weinberg, for the defendant, submitted a brief.

PIERCE, J. These are actions of tort, brought by a wife and her husband, to recover direct and consequential damages resulting to the plaintiffs from injuries sustained by the wife by reason of an alleged defective condition of a stairway on the premises of the defendant, used by the plaintiffs as tenants of the defendant in common with other tenants. There was evidence which would warrant the jury in finding for the plaintiffs. The only question now presented is whether the defendant on the facts in evidence, under R. L. c. 175, § 24, had the right to prove that a witness called by her had made statements that were inconsistent with his testimony given at the trial.

Provotkin the witness sought to be impeached, examined by the defendant, denied that he had any conversation with either of the plaintiffs regarding the case; stated that he did not recall having any conversation with Bornstein, the impeaching witness, regarding the case; that he was "almost" sure that he did not "overhear Mrs. Bloustein [the plaintiff] at any time after this miscarriage that she had took place, say anything about this case to anybody, after the miscarriage took place;" that he "could n't tell" whether he heard her say anything about how this case happened; that he did not hear her say anything about how she had the miscarriage, and that he did not recall that at any time he had told Bornstein a different story of what he overheard than he now stated to the jury.

The witness Bornstein, against the exception of the plaintiffs, was permitted to testify that Provotkin did have a conversation with the witness at the house of the witness about the Bloustein case. He was then, against the exception of the plaintiffs, permitted to testify that he (Provotkin) had told him (the witness) that he had overheard the plaintiff Mrs. Bloustein say to one Mrs. Berman, "that she had a fight with a little boy which he kicked her and from that she had a miscarriage."

The testimony of what Provotkin told Bornstein he had overheard Mrs. Bloustein say to Mrs. Berman was not inconsistent with the testimony of Provotkin that he was unable to recall that he had stated to Bornstein a different story than he stated in court; that he did not remember saying anything different to

Bornstein; that he did not hear her (Mrs. Bloustein) say anything about how the case happened or about how she had the miscarriage. In a word, the testimony of witness was colorless: he had given no testimony in favor of the plaintiffs against the contention of the defendant. The rights of the defendant were fully protected by the admission of the testimony of the impeaching witness, that Provotkin had talked to him about the case and had told him that he had overheard a conversation between Mrs. Bloustein and Mrs. Berman regarding the miscarriage. The admission of the conversation itself was not in contradiction of any testimony of the witness Provotkin, and was highly prejudicial to the plaintiffs. The case cannot be distinguished from, and is governed by, *Corsick v. Boston Elevated Railway*, 218 Mass. 144. See *Elmer v. Fessenden*, 154 Mass. 427.

The presiding judge charged the jury as follows: "Now there is only one other thing I want to say to you. The last witness that was called here was called by the plaintiff to impeach a prior witness. If you do not believe what the last witness says, why, then he is out of the case. If you do believe what he says then you have simply impeached the testimony of the other witness, that is all. You have left yourself in the position where the first witness's testimony is not to be relied upon; but by doing that or making that finding you have just put the testimony of the first witness out of the case. You do not put in the second witness's testimony as affirmative facts or having any probative force. All he is called for is to impeach the other witness. If you do not believe that he has impeached him the other witness stands if you believe him. If you say the second witness has impeached the first one, why, then the testimony of the first witness you do not longer believe; but nothing the second witness has said is to be taken as establishing any affirmative fact or having any probative force in this case." The instructions protected the plaintiffs, and it must be presumed the jury followed the instructions. *Barker v. Mackay*, 175 Mass. 485.

Exceptions overruled.

ALBERT S. WOODWORTH vs. ANDREW G. FULLER.

Essex. March 9, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Evidence, Pleadings.

Where, in an action of contract, the plaintiff, after an auditor to whom the action was referred had filed a report, amended his declaration so that he claimed an amount more than \$2,400 larger than that claimed in the original declaration and the action was recommitted to the auditor who filed a supplemental report, it is not a violation of R. L. c. 173, § 85, for the defendant's counsel, in cross-examination of the plaintiff at a subsequent trial of the action before a jury, while holding the pleadings in his hand to inquire when the plaintiff first had made the claim which was the basis of his action and whether he had not prepared and given to his counsel a statement in which he fixed the amount claimed at a sum considerably smaller than that to which he had testified.

CONTRACT for personal services rendered during the years 1901-1904, and for money lent. Writ dated September 6, 1910.

The action was referred to an auditor, who filed a report on September 23, 1912. Thereafter the defendant, Fuller, moved for leave to file a declaration in set-off and to recommit the case to the auditor. The motion was allowed and the declaration in set-off was filed on December 9, 1914, alleging that Woodworth owed Fuller the sum of \$4,190 for board and lodging of Woodworth and his wife from 1905 to and through 1910. On October 6, 1915, Fuller filed an amended declaration in set-off alleging that Woodworth owed him the sum of \$6,624. This amended declaration in set-off was recommitted to the auditor, and on November 6, 1915, he filed a supplemental report.

The action then was tried before *Wait, J.* The jury found for the plaintiff in the sum of \$435.54, making no finding on the declaration in set-off. A motion for a new trial on the ground that the jury had failed to make a finding upon the declaration in set-off erroneously was denied, and, upon a report to this court of that ruling, a new trial of all the issues was ordered in a decision reported in 230 Mass. 160.

There was a second trial before *N. P. Brown, J.* Material

evidence and exceptions by the defendant, plaintiff in set-off, are described in the opinion. The jury found for Fuller on the main declaration, and also for him on the declaration in set-off in the sum of \$156; and Fuller alleged exceptions.

R. L. Sisk, for Fuller.

J. J. Ronan, for Woodworth.

JENNEY, J. The sole controversy is upon the exceptions of the defendant Fuller to the admission of evidence which was elicited on his cross-examination, and which related to his declaration in set-off. The defendant contends that the evidence was improperly received, solely because it infringed upon his rights under R. L. c. 173, § 85, which provides that "Pleadings shall not be evidence on the trial, but the allegations therein shall bind the party who makes them." The exceptions were taken at a trial, after the decision in this case reported in *Woodworth v. Fuller*, 230 Mass. 160.

The action was brought on September 6, 1910, and on September 23, 1912, an auditor's report was filed. On February 9, 1914, Fuller was permitted to file a declaration in set-off in which he claimed that Woodworth owed him \$4,190 for board and lodging, "from 1905 up to and through 1910." On October 6, 1915, an amended declaration in set-off was filed and allowed, in which Fuller claimed to recover \$6,624 for board and lodging furnished from May 1, 1901, to August 5, 1910; and the case was recommitted to the auditor.

During the cross-examination of Fuller he was interrogated, subject to exceptions, as to when he first prepared the account which appears in his amended declaration in set-off; when he first furnished his attorney the information on which that declaration was based; whether he had prepared any such account before his testimony at a previous trial of the case; and whether he did not at some time give to his attorney a statement in which he claimed that all that was due him was \$4,100. The inquiry was repeated several times, and Fuller answered: "I could n't say." "I don't know." "I don't remember." Finally, subject to exception to the questions, the following questions and answers ensued: — "Q. Did you at any time furnish . . . a statement of what you claimed Stanley R. Woodworth owed you, amounting to \$4,190 odd?" After objection had been made a discussion followed and the judge said, "It may appear in the record that while he is asking the

question, Mr. [M. L.] Sullivan [counsel for Woodworth] stands with the pleadings in his hand." The examination continued: "Q. Did you . . . prepare any such statement? A. Mr. [M. H.] Sullivan prepared a statement. I couldn't say how much it was. . . . Did you give him that information? A. Yes, sir. Q. And your information that you gave him and that you prepared for him there, amounted to \$4,100? A. I couldn't say. . . . Q. When did you make it? A. I couldn't say when I did make it. I know I gave him the information that he wanted and he made it out, but I couldn't say just when it was. Q. Did you give him information more than once? A. I couldn't say I did, but still I don't know. I couldn't say."

The questions and answers quoted graphically state the situation. Without referring to the increase in the amount sought to be recovered by reason of the amendment, but holding the pleadings in his hand, counsel for Woodworth in substance asked Fuller when he had first made the claim which is the basis of his set-off and whether he had not prepared and given to his counsel a statement in which he fixed the amount claimed at a sum considerably smaller than that to which he had testified. No claim was then or is now made that the evidence was not relevant to the issues in the case or that the inquiry was improper for any reason except that involved in the statute.

The statute frequently has been construed, and any detailed discussion or citation of authorities as to its effect is not required. It makes no change in the admissibility of evidence, except as necessarily required by its plain terms, and the limitation relates solely to the evidentiary use of the pleadings. It does prevent comment on a change in the pleadings by amendment, (*Demelman v. Burton*, 176 Mass. 363,) and no comment was made. It does not forbid proper reference to any inconsistency in the conduct or statements of a party or witness. The only references made to the pleadings were those caused by the statements of the attorney for Fuller in his objections to the questions propounded. There was no impropriety in the use made of the pleadings. The questions did not relate to their contents, but to "declarations material to the issues on trial." See *Hutchinson v. Plant*, 218 Mass. 148, 157, and *Commonwealth v. Russ*, 232 Mass. 58, 81.

The pleadings define and limit the issues in a case. It is cus-

tomary and proper for counsel in opening not only to state to the jury what they expect to prove, but to define the nature of the questions involved. In this Commonwealth from time immemorial, in opening, the pleadings have been read to the jury. Howe's Practice (1834) 252. Colby's Practice (1848) 238. At the close of a trial, the writ and declaration and answers in their final form customarily go to the jury. See *Smith v. Holcomb*, 99 Mass. 552, 555. It is not necessary to consider whether this practice is founded on right rather than upon discretionary authority.

It is clear that the exceptions show no reversible error, and that they must be overruled, and it is

So ordered.

JACOB LEVINE vs. LOUIS D. COHEN.

Suffolk. March 10, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNET, JJ.

Practice, Civil, Requests for rulings.

No error appears in the denial of requests for rulings where there is nothing stated in the record showing what, if anything, the subject matter of the requests have to do with the issues involved in the trial, or showing or tending to show their pertinency, or that the party making them was injured by their refusal.

A request for a ruling based upon an assumption of fact contrary to the finding of the trial judge is properly denied.

CONTRACT on a promissory note for \$1,000, dated May 27, 1918, and due September 3, 1918, by an indorsee against an indorser before delivery. Writ in the Municipal Court of the City of Boston dated September 9, 1918.

The material evidence at the hearing in the Municipal Court is described in the opinion. The defendant requested the judge to rule as follows:

"3. As between this plaintiff and his principal Morrison and the defendant, the gasoline tanks being in the ground are a part of the realty. If they are taken away from Marron by the true owner the consideration for the note fails in so far as the value of these tanks are concerned.

"4. The sale for which the note was in part given, being under foreclosure, it conveys everything called fixtures in the original mortgage for breach of the terms of which the foreclosure was made, and the consideration for the note fails in so far as these fixtures or any of them are not delivered to Marron or being delivered are lawfully taken away from him.

"5. The consideration for the note likewise fails in so far as Marron has been obliged to pay sums of money to put the building in condition to receive license to operate if the court shall find that Morrison promised so to do at the time of the sale.

"6. The action by the mortgagee Morrison in entering to foreclose the mortgage upon the premises since this suit was begun, to wit, on Monday, December 30, 1918, defeats this action if it is found that this plaintiff knew that the conditions of the original sale had not been complied with."

The judge refused to rule as requested, found that the plaintiff was the holder of the note for value, that there was no failure of consideration, and that the conditions of the sale were substantially complied with; and found for the plaintiff in the sum of \$1,000 with interest.

The judge then reported the case to the Appellate Division, who dismissed the report. The defendant appealed.

The case was submitted on briefs.

H. H. Pratt, for the defendant.

W. I. Schell & A. C. Webber, for the plaintiff.

JENNEY, J. In this action, brought in the Municipal Court of the City of Boston upon a negotiable promissory note against one who had indorsed the note before delivery, the judge found without exception that the plaintiff, who was an indorsee for value, took the note subject to all equities between the original parties.

There was evidence tending to prove that the note was given in payment for a garage purchased at auction under a mortgagee's sale. The report does not show what was included in the sale, or what were its terms. The judge found that there was no failure of consideration, and that the conditions of the sale were substantially complied with.

The case is here, after a finding for the plaintiff, on the defendant's exceptions to the refusal to give four requests for rulings. Three, relating to claims of partial failure of consideration,

were denied as inapplicable. The defendant thereby asked the trial judge to rule that such failure existed because gasoline tanks and fixtures were part of the realty or were not delivered to the purchaser or retained by him, and because the purchaser was obliged to expend money on the garage in order to procure a license permitting its use. On the meagre record it does not appear what, if anything, the subject matter of these requests had to do with the issues involved in the trial. Nothing is stated showing, or tending to show, their pertinency, or that the defendant was injured by their refusal. Hence no error appears in their denial. *Canfield v. Canfield*, 112 Mass. 233. *Horton v. Cooley*, 135 Mass. 589. *Hansen v. Fitchburg & Leominster Street Railway*, 222 Mass. 116.

The remaining request is as follows: "The action by the mortgagee Morrison in entering to foreclose the mortgage upon the premises since this suit was begun, to wit, on Monday, December 30, 1918, defeats this action if it is found that this plaintiff knew that the conditions of the original sale had not been complied with." This was rightly denied. It is based on the assumption that the conditions of the sale had not been complied with. The judge, however, found to the contrary. Moreover, the considerations already stated when considering the other requests apply to this with equal force. The defendant does not argue his appeal so far as it relates to the denial of his motion made in the Appellate Division of the Municipal Court for a recommittal of the report, and it is treated as waived. See *Cohen v. Berkowitz*, 215 Mass. 68; *Jackson Caldwell Co. v. Poto*, *ante*, 58.

It follows that the order of the Appellate Division denying the motion to recommit the report and dismissing the same, must be affirmed; and it is

So ordered.

COMMONWEALTH vs. ALEX FRISHMAN & others.

Suffolk. March 10, 1920. — April 2, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Pleading, Criminal, Complaint. Riot.

Allegations in a complaint, that the defendants "did unlawfully, riotously and tumultuously assemble with thirty or more persons, and while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life, to wit, a knife, did . . . wound . . . a police officer of said city of Boston, lawfully engaged in dispersing and suppressing said unlawful assembly," fully and sufficiently charge the defendants with the common law offence of a riot.

The allegation of assault in the complaint above described is merely incidental to and a part of the charge of riot, but is not an essential part of that offence.

A parade on a public street of the city of Boston without a permit required by the board of street commissioners is unlawful.

Where, at the trial of a complaint charging the common law offence of a riot, there is evidence upon which it can be found that the defendants participated in a common purpose by force and violence to march and parade on a public street without permission and in violation of law, that during the progress of the parade the paraders were ordered to disperse and that violence ensued, a finding is warranted that the defendants were guilty of a riot.

In order that the defendants above described should be found guilty of the common law offence of a riot, it is not necessary that all of them should commit a physical act of violence; but it is sufficient to warrant conviction if the defendants are found to have been acting in concert with the others for the accomplishment of a common unlawful purpose and were aiding and abetting by their presence.

Persons present at a riot and consenting to the unlawful acts and in a position where they may render aid and assistance may be found guilty as principals.

Where, at the trial of the complaint above described, which alleged that a police officer was stabbed with a knife, there was evidence that the officer was stabbed but no direct evidence of the character of the weapon used, it was *held*, that a finding that he was stabbed with a knife was not unwarranted.

Upon a complaint charging the common law offence of a riot and containing an allegation that the defendants "while unlawfully assembled" assaulted a police officer with a knife, it is not necessary under R. L. c. 218, §§ 21, 34, 35, to show that the officer was stabbed by one of the defendants or that he was stabbed at all.

Upon a complaint charging an offence which is a riot at common law, the offence exists independently of statute, and it is not necessary to prove that the participants were ordered to disperse by the officials named in R. L. c. 211, § 1.

FOURTEEN COMPLAINTS, received and sworn to in the Municipal Court of the Roxbury District of the City of Boston, in two counts,

charging in both counts that the defendants on May 1, 1919, did "within the judicial district of said court, with force and arms, unlawfully, riotously and tumultuously assemble with thirty or more persons against the peace of said Commonwealth, and the form of the statute in such case made and provided," and in the second count, charging in addition that the defendants "while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life, to wit, a knife, did beat, bruise, wound and evil treat, one Samuel C. Hutchins, a police officer of said City of Boston, lawfully engaged in dispersing and suppressing said unlawful assembly."

On appeal to the Superior Court by agreement the defendants were tried together before *Fessenden, J.*, on the second count of the complaint. The material evidence is described in the opinion. At the close of the evidence, the defendants requested, among others, the following rulings:

"1. The evidence is insufficient to warrant a conviction of the crime set forth in the complaint;

"2. There is no evidence to justify a finding that officer Hutchins was stabbed with a knife;

"3. In order to find the defendants guilty of rioting, the jury must be satisfied beyond a reasonable doubt that officer Hutchins was actually stabbed by one of the paraders so called, and not, whether accidentally or otherwise, by one of the civilians so called who were aiding the police;

"4. There is no evidence that any of the defendants participated directly or indirectly in any riot;

"5. In order to find the defendants guilty of rioting, the jury must find beyond a reasonable doubt that each of them so found guilty must have had an intent, previous to the alleged stabbing of officer Hutchins, together with others of the defendants or with others of the paraders so called, to so stab officer Hutchins, or at least to follow such a course of conduct that his stabbing naturally and logically flowed therefrom; and

"6. Before the defendants could be convicted of a riot in this Commonwealth, it is necessary that the mayor of the city of Boston, or one of the council of the city of Boston, or a justice of the peace or the sheriff, or one of his deputies, of the county of Suffolk should have gone among the persons so assembled on

May 1, 1919, or as near as might have been with safety, and in the name of the Commonwealth, commanded the persons so assembled to peaceably disperse; and until one of the aforesaid officers requested the persons so assembled to disperse, they cannot be guilty of a riot."

The judge refused to give these rulings, and in substance instructed the jury that riot could be described generally as a tumultuous disturbance by a sufficient number of persons, in this case thirty or more, assembled with intent to commit or assist in the execution of an unlawful act by force and violence; that the essential element was that there must be the violence and the intent to commit an act of violence; that it was not necessary that there should be a long consultation beforehand; that the purpose might be formed suddenly; that, although the assembly may not have been unlawful on the first coming together of the parties, it might become so by their engaging in a common cause to be accomplished with force and violence; that the claim of the Commonwealth was that these persons determined to override the police and to proceed with force and violence; that mere presence was not enough; that there must be the intent to accomplish unlawfully the purpose by force and violence; that it was not necessary to show that any one of the defendants struck Hutchins; that if the defendants, having such intent, were there, aiding, abetting, encouraging, participating, advising by their presence, by their gestures, signs, or by anything which they did or said, they would be equally guilty with the one who struck the blow, if any was struck; that it was necessary that it should be shown that the defendants so participated in the commission of the offence on officer Hutchins; that each one of the defendants should have so participated; that the defendants were presumed to be innocent, and that the Commonwealth must establish beyond a reasonable doubt that the defendants were guilty of the essential matters shown in the complaints.

The jury found the defendants guilty. The defendants alleged exceptions.

R. L. c. 211, § 1, reads as follows: "If twelve or more persons, being armed with clubs or other dangerous weapons, or if thirty or more persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in a city or town, the mayor and each

of the aldermen of such city, each of the selectmen of such town, every justice of the peace living in any such city or town and the sheriff of the county and his deputies shall go among the persons so assembled, or as near to them as may be with safety, and in the name of the Commonwealth command all persons so assembled immediately and peaceably to disperse; and if they do not thereupon immediately and peaceably disperse, each of said magistrates and officers shall command the assistance of all persons there present in suppressing such riot or unlawful assembly and arresting such persons."

R. L. c. 218, §§ 21, 34 and 35, read as follows:

"Section 21. The means by which a crime is committed need not be alleged in the indictment unless they are an essential element of the crime."

"Section 34. An indictment shall not be quashed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defence; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars as provided in section thirty-nine.

"Section 35. A defendant shall not be acquitted on the ground of variance between the allegations and proof if the essential elements of the crime are correctly stated, unless he is thereby prejudiced in his defence. He shall not be acquitted by reason of an immaterial misnomer of a third party, by reason of an immaterial mistake in the description of property or the ownership thereof, by reason of failure to prove unnecessary allegations in the description of the crime or by reason of any other immaterial mistake in the indictment."

T. G. Connolly, (E. J. Casey with him,) for the defendants.

D. M. Lyons, Assistant District Attorney, for the Commonwealth.

CROSBY, J. These complaints in the second counts charge that the defendants on May 1, 1919, "did unlawfully, riotously and tumultuously assemble with thirty or more persons, and while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life, to wit, a knife, did . . . wound . . . one Samuel C. Hutchins, a police officer of said city of Boston, lawfully engaged in dispersing and suppressing said unlawful assembly. . . ." The

allegations in the second counts fully and sufficiently charge the defendants with the common law offence of a riot. *Commonwealth v. Runnels*, 10 Mass. 518. *Commonwealth v. Gibney*, 2 Allen, 150. Train & Heard's Prec. of Indictments & Special Pleas, 456. 3 Bish. New Crim. Proc. § 992 (2).

On May 1, 1919, a meeting of Socialists was held in the Dudley Street Opera House in Boston. The record recites that it was an orderly meeting held for a lawful purpose; that it was largely attended, both sexes and various nationalities being present; that there was music, and speaking from the platform; that the meeting adjourned to International Hall, so called, which was more than a mile distant from the opera house; that those at the meeting and others went from the opera house up Warren Street on the way to International Hall; that up to that time there were about fifteen hundred men and women and some children present; that nearly all wore some article of red and a large number of red flags were carried, on some of which were printed words in a foreign language; that as the crowd went up Warren Street there was singing in one or more foreign languages; that no American flag was carried; that from various parts in this body there were shouts, singing, and loud cries of "Down with the Millionaires! Kill the Cops! To Hell with the Police! Hurrah Bolsheviks! To Hell with the American Flag." From this evidence it is plain that the jury were warranted in finding that the crowd of men and women walking along Warren Street constituted a "procession or parade" and that the persons so participating were "marching" on a public street as those words are used in a regulation of the board of street commissioners of the city of Boston, which regulation was in force on that day and provided that "No procession or parade, containing two hundred or more persons . . . shall . . . march on any public street of the city except in accordance with permit issued by the board of street commissioners." St. 1854, c. 448, § 35. St. 1908, c. 447. No permit had been issued to this body.

There was further evidence that when the crowd reached the corner of Warren and Copeland streets, police officer Wiseman stood in front of the advancing crowd and asked the man in front leading the parade if he had a permit, "and a fellow standing right in behind him said, 'No, to Hell with the permit;'" that

the officer said "Don't you know you ain't allowed to parade the streets without the American flag?" and he said "To hell with the American flag and the cops too." The officer testified that thereupon he was wheeled around, jostled, and some one tried to trip him, and the crowd kept right on past him. There was also evidence tending to show that threats were made to police officers; that soon after a patrol wagon containing six or seven officers in charge of Sergeant Casey came up; the men jumped out of the wagon and formed a line across Warren Street in front of the paraders and Casey asked the man who appeared to be a leader if he had a permit; that none was produced; that he thereafter commanded the crowd to disperse; that the crowd surged forward and forcibly assaulted the policemen, who drew their clubs and pushed back the crowd; that the latter did not separate, but went down Bower Street and threw stones and other missiles at the officers; that two shots were fired in the direction of the police; that shots were fired by both the policemen and the paraders; that one of the officers was mortally wounded, and Samuel C. Hutchins, another officer, was struck by one of the paraders with a flagstaff and was stabbed and permanently injured; that many persons were hit by blows from clubs, missiles and shots coming from the paraders.

There was evidence that Hutchins was ordered by Casey to arrest the men with the flags, "it being Sergeant Casey's object in giving this order to thereby have under arrest the men who were leading in the parade;" that Hutchins went through the crowd to arrest one of the men with a flag "five or six rows back;" that while struggling with this man for possession of the flag he was assaulted by the paraders and struck from behind and also struck across the head and shoulder with a flagstaff, and was stabbed but did not know that he had been stabbed until afterwards.

The parade being in violation of the regulations was unlawful. There was evidence from which it could have been found that all these defendants were in the parade and formed a part thereof. Without reciting in detail the evidence relating to the acts of each defendant, it is plain that all could have been found to have participated in a common purpose by force and violence to march and parade on a public street without permission and in violation of law, and with such a finding they could have been found guilty

of a riot. If the defendants were acting in concert with the others for the accomplishment of a common unlawful purpose, it is not necessary to constitute a riot that all should commit some physical act, it is enough if they were present, aiding and abetting by their presence. *State v. Straw*, 33 Maine, 554. *State v. Snow*, 18 Maine, 346. If, as the jury could have found, the defendants were present consenting to the unlawful acts, and in a position where they might render aid and assistance, they are guilty as principals. *Commonwealth v. Knapp*, 9 Pick. 495, 518. *Clifford v. Brandon*, 2 Camp. 358, 370. It follows that the first and fourth requests were rightly refused.

The second request for a ruling that "There is no evidence to justify a finding that officer Hutchins was stabbed with a knife," could not properly have been given. While there was evidence that the officer was stabbed, there was no direct evidence that the weapon used was a knife. It would not seem to be an unwarrantable inference that a stab wound was caused by a knife; however that may be, the offence charged is a riot, a specific offence; the allegation of the assault is merely incidental to and a part of the charge of a riot, but it was not an essential part of that offence. It was not necessary to convict of a riot to show that the officer was stabbed by one of the paraders with a knife, or that he was stabbed at all.

R. L. c. 218, §§ 21, 34, 35. *Commonwealth v. Hunt*, 4 Pick. 252. *Commonwealth v. Randall*, 4 Gray, 36. *Commonwealth v. Hall*, 142 Mass. 454. *State v. Russell*, 45 N. H. 83, 86. See cases collected in 18 Encyc. of Pl. & Pr. 1204. The decision in *Commonwealth v. McCarthy*, 145 Mass. 575, is not at variance with the conclusion reached.

It was not necessary to a conviction to prove that the persons who took part in the parade were commanded to disperse by any of the officials named in R. L. c. 211, § 1. The offence charged, being a riot at common law, exists wholly independent of the statute. *State v. Russell*, *supra*. Accordingly the sixth request was rightly refused.

The presiding judge accurately instructed the jury upon the issues of law presented, and, as the rights of the defendants seem to have been fully protected, the entry must be

Exceptions overruled.

WILLIAM D. WRIGHT vs. CONCORD, MAYNARD AND HUDSON
STREET RAILWAY COMPANY.

Middlesex. March 2, 1920. — April 3, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

*Negligence, Motor vehicle, Street railway, Proximate cause. Proximate Cause.
Practice, Civil, Exceptions.*

In an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets, there was evidence that the collision occurred on a dark night, that the front and rear lights of the motor vehicle were lighted, that it was being driven at a moderate rate of speed on the right hand side of the street, that some of the curtains behind the motorman were drawn, and that the driver, seeing a vehicle approaching, supposed that it was a truck and had no knowledge that it was a street car until, almost at the instant of the collision, the searchlight of the street car was turned on. *Held*, that there was evidence that the driver of the motor vehicle was in the exercise of due care.

At the trial of the action above described there also was evidence that the motorman saw the motor vehicle when it was one hundred feet away, that he gave no warning of the approach of the street car and did not diminish its speed as it rounded the corner. *Held*, that there was evidence of the defendant's negligence.

At the trial of the same action, there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, and the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent. *Held*, that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction.

TORT for injury to a motor car, owned by the plaintiff and operated by his chauffeur, resulting from a collision with a street car of the defendant near the junction of Main Street and Sudbury Road in Concord. Writ dated October 1, 1913.

In the Superior Court the action was tried before *Hitchcock, J.* Material evidence is described in the opinion. At the close of the evidence the defendant moved that the judge order a verdict for the defendant. The motion was denied. The defendant then requested the judge to give to the jury, among other instructions, the following:

"1. On all the evidence the plaintiff is not entitled to recover.

"2. On all the evidence the person operating the automobile was not in the exercise of due care."

"4. There is no evidence from which the jury can find any negligence on the part of either the motorman or the conductor of the street car.

"5. If the jury find that the automobile crossed or was crossing the street car track directly in front of the street car while the street car was moving then the person operating the automobile was negligent as a matter of law and the plaintiff is not entitled to recover."

"7. If the jury find that the automobile crossed or was crossing the street car track immediately in front of the street car while the street car was moving the jury must disregard any evidence that the person operating the automobile looked and did not see a street car approaching for he must be regarded as a matter of law under these circumstances to have looked carelessly and so was in the same situation as if he had not looked at all and is guilty of negligence which contributed to the accident and prevents the plaintiff from recovering."

These rulings the judge refused to give.

The judge instructed the jury in part as follows:

"It is claimed by the plaintiff as his chauffeur was coming along Main Street as he claims in a reasonably proper and careful manner that he did properly attempt to cross and did cross the street railway track where it turned to go up Sudbury Road, and that while he was doing that the car came upon the automobile and struck him and caused the damage that is claimed to have accrued to the automobile.

"On the other hand the plaintiff says that is due to carelessness in the operation of the street car and that the chauffeur in operating it was operating it in a proper manner and as a part of the operation and a part of the so called negligent operation of the street car it is claimed by the plaintiff that at the last moment right at the time almost of the impact between the two, that the motorman suddenly put on a blinding headlight and that so dazzled and affected the chauffeur in operating the automobile that he was not able at that time properly to get his car out of the way so but what an accident happened.

"Now, there is no negligence in having this high powered searchlight upon the electric car . . . but the claim is made that in operating that headlight it was done in a careless and negligent manner. That is, if the headlight had been shining all the way upon the street there that would not be negligence even though that might blind the eyes as you are looking toward it, but the claim was made that it was turned on by the motorman right at the accident and in such a way and under such circumstances as to have the effect upon the chauffeur in operating the automobile and in such a way as to constitute a negligent and careless act on the part of the motorman in turning on the light when he did. That is one of the circumstances in the case and to be considered, and the question finally comes upon the two propositions, first, was there any carelessness or negligence on the part of the motorman of the car which brought about the cause of the injury to the property of the plaintiff."

At the close of the charge, the defendant saved exceptions to such portions of it as in substance instructed the jury that they might consider the act of the motorman in turning on the headlight as negligence.

The jury returned a verdict for the plaintiff in the sum of \$1,000; and the defendant alleged exceptions.

H. L. Barrett, (E. C. Thayer with him,) for the defendant.

A. T. Johnson, for the plaintiff.

CARROLL, J. The plaintiff's automobile was damaged by a collision with one of the defendant's cars near the junction of Main Street and Sudbury Road, Concord. The defendant's tracks are in the middle of Main Street; at the intersection of the two streets they leave Main Street and run to the side of Sudbury Road, which branches off from Main Street at an acute angle. On a dark night in August, 1913, the plaintiff's chauffeur was driving an automobile along the right hand side of Main Street. He testified that as he approached the intersection of the two ways he saw a small light which he thought was a "truck light" on a vehicle moving toward him on Main Street. He knew of the intersection of the two streets and that the street cars ran on Main Street and in and out of Concord Square, but had no knowledge that the tracks turned into Sudbury Road at that point. As the automobile drew near the car track the street car entered the

curve, the direction of the headlight varied a little and, as the chauffeur was crossing the track, the searchlight of the car was turned on, as he testified, blinding him so that he could not see. He at once threw on his brakes and brought the automobile to a standstill, when it was struck and damaged by the defendant's street car.

There was evidence that the driver of the automobile was in the exercise of due care. The jury could find that he was on the right hand side of the street, supposed the vehicle he saw approaching him on Main Street was a truck, and had no knowledge that it was a street car until the searchlight was turned on almost at the instant the collision occurred. There was evidence of the darkness, that the front and rear lights of the automobile were lighted, that the automobile was moving at a moderate rate of speed, and that some of the curtains behind the motorman were drawn. *Halloran v. Worcester Consolidated Street Railway*, 192 Mass. 104, 105. *Eustis v. Boston Elevated Railway*, 206 Mass. 143. *Doherty v. Boston & Northern Street Railway*, 207 Mass. 27, 29.

The motorman saw the plaintiff's automobile at least one hundred feet away from him. There was evidence that no warning of the approach of the street car was given and that its speed was not diminished as it rounded the curve. The jury could find that the motorman should have known that the automobile was moving toward the track; that some warning should have been given and the car placed under proper control; that in the exercise of proper care the defendant could, if necessary, have stopped the car and prevented the collision. *Fallon v. Boston Elevated Railway*, 201 Mass. 179, 181. *Lawrence v. Fitchburg & Leominster Street Railway*, 201 Mass. 489, 492. *Horsman v. Brockton & Plymouth Street Railway*, 205 Mass. 519, 521.

There was sufficient evidence, therefore, of the defendant's negligence and of the plaintiff's due care, and we assume, without deciding, that the allegations of the plaintiff's declaration were sufficient to permit his recovery.

But in one respect there was error. The judge instructed the jury that, while there was no negligence in having the high power searchlight on the car, they might consider the conduct of the motorman in turning on this light at such a time and in such a way as to dazzle the chauffeur, and left it to them to determine whether

the motorman was in fact negligent in turning on the searchlight at the time when the collision was imminent. This instruction was excepted to by the defendant. The evidence showed that, as the plaintiff's automobile entered the track, the searchlight was turned on and at that instant the car struck the automobile. When the searchlight was turned in the face of the chauffeur he then was on the track and it does not appear that at this time it was possible to have avoided the collision. There was no evidence to support the contention that the turning on of the searchlight was the cause of the collision, and, as the instruction, that the motorman could have been found to have been negligent if he turned on this light at the time, was erroneous and harmful to the defendant, the exceptions must be sustained.

So ordered.

CHARLES M. BREAKEY's (dependents') CASE.

Suffolk. March 3, 1920. — April 3, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNET, JJ.

Workmen's Compensation Act, Dependency.

A husband and wife are not living together within the meaning of the workmen's compensation act so that the wife may be conclusively presumed to be wholly dependent upon her husband, where it appears that after the marriage and until his death the husband continued to live with his mother and the wife with her mother, although, from the time of the marriage, the husband contributed to his wife's support and visited her in her home twice a week, usually staying over night, when they occupied the same room.

APPEAL to the Superior Court from decisions of the Industrial Accident Board, awarding compensation as for partial dependency to the widow and also to the mother of Charles M. Breakey a deceased employee, affirming findings of a single member of the board.

In the Superior Court, upon motion of the mother and by consent, the claims were consolidated and were heard together by *Wait, J.* Material findings and rulings of the Industrial Accident Board are described in the opinion. The judge ruled that the

evidence required as matter of law a finding that the widow was living with her husband at the time of his death and was conclusively presumed to be wholly dependent upon him; and he ordered the claim remanded to the Industrial Accident Board for action in accordance with the ruling. Later, the claims, after recommittal, again came before the Superior Court and the judge ordered that the widow should receive \$10 a week and that the mother was entitled to no compensation. The mother appealed from the decree ordering compensation for the widow and from the decree denying her compensation.

F. L. Simpson, for the mother.

W. J. Day, for the widow.

L. H. Peters, for the insurer.

CARROLL, J. The employee was killed on May 20, 1918. At the time of his marriage on July 15, 1917, and until his death, he lived with his mother on Moreland Street, Roxbury. His wife, both before and after marriage, lived on Dudley Street at the home of her mother. She was employed by the Thomas G. Plant Company earning \$15 per week. From the time of the marriage the husband paid her \$10 per week for her support and visited her twice a week, "usually stayed over night," when they occupied the same room. The employee's mother testified that he paid for the household supplies and also paid the house rent, purchased clothing for her and gave her money, and that his mail came to her house on Moreland Street. The Industrial Accident Board awarded weekly compensation of \$4.55 for a period of five hundred weeks to the widow and weekly compensation of \$2.73 for the same period to the mother. In the Superior Court this finding was reversed and a decree was entered denying compensation to the mother and awarding compensation of \$10 per week to the widow. The mother appealed.

To become entitled to the full compensation awarded the widow by the Superior Court, it must have been found that she was, at the time of her husband's death, living with him within the meaning of the workmen's compensation act. If she was not living with him when he died, so as to be wholly dependent on him under the statute, the question of her dependency was to be determined by the board in accordance with the facts existing at the time of the injury.

The finding of the Industrial Accident Board, that the employee and his wife were not living together, was justified by the evidence and we cannot say the finding was wrong. In *Nelson's Case*, 217 Mass. 467, when referring to the conclusive presumption that the widow was wholly dependent upon her husband, it was said that the words "with whom she lives" meant living together as husband and wife in the ordinary acceptance of the term, where there is a home and the husband and wife live together in the same household. While there may be interruptions and the nature of the husband's employment may require him to be frequently absent from the home, "there must be a home and a life in it." The statute making the wife wholly dependent on the husband, did not contemplate that there was to be one home for the wife and another for the husband. The purpose of the statute was to provide for the wife and give her the benefit of the conclusive presumption when she lived with her husband and occupied the same home with him. *Newman's Case*, 222 Mass. 563. *McDonald's Case*, 229 Mass. 454.

Applying these principles, it cannot be said as matter of law that the Industrial Accident Board was wrong. The employee's clothing and personal property were kept in his mother's home, he gave his address as 143 Moreland Street, he ate and slept there. The widow admitted that he resided there when not calling on her. He always returned there from his work and occupied the mother's tenement as his home in the same way and to the same extent as he did before the marriage, and neither the employee nor his wife made any change in their home or residence after the marriage. The board was justified in finding that the employee's home was his mother's home and that the widow's home was her mother's home and that they were not living together in the sense that it could be conclusively presumed that she was wholly dependent upon him for support.

As the evidence admitted at the hearing before the single member, against the widow's exception, was excluded by the board, we do not consider it.

The decree of the Superior Court must be reversed and a decree is to be entered in accordance with the findings of the Industrial Accident Board.

So ordered.

SAMUEL C. BENNETT vs. N. THOMSON & another.

Suffolk. March 4, 1920. — April 3, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Contract, In writing. *Sale*, Warranty. *Practice, Civil*, Ordering of verdict, Estoppel arising from position taken by counsel at trial. *Estoppel. Evidence*, Of false representations, Presumptions and burden of proof. *False Representations*.

Where, by a formal bill of sale and conveyance under seal, the owner of "All brick of every name, nature and description located" on certain property for the stated consideration of \$4,000 conveyed the bricks, thus described, to one who paid therefor \$1,000 in cash and \$3,000 by a promissory note, the instrument containing a covenant and warranty of title but no warranty or representation as to quality, it is not open to the purchaser, in an action against him by the seller upon the promissory note, to contend that there had been on the part of the seller a breach of warranty of quality, for which the purchaser sought damages in recoupment.

At the trial of the action above described, at a time when there were in the answer a general denial, denial of consideration and an allegation that the defendant had been induced to sign the note by misrepresentations by the plaintiff as to the quality and quantity of the brick, but no allegation of a breach of warranty of quality, the plaintiff was asked by his counsel, "Did you intend to mislead the defendant?" and, in a colloquy which ensued between the counsel for the defendant and the judge, wherein the judge asked the defendant's counsel, in substance, if he intended to rely upon the allegation of misrepresentation in the answer, the counsel replied that it seemed to him that he "ought not to be asked point blank what" he "personally" claimed was "the whole transaction," that he intended to amend the "pleadings to claim that the goods were warranted up to a certain standard and were not up to that standard," that he did not make the claim of a misrepresentation "as the pleadings stand now, but I want to amend the pleadings." The judge then ruled, "If you simply want to amend by adding, you [addressing the plaintiff's counsel] may put the question, . . . whether he [the plaintiff] intended to mislead." The defendant later was permitted to amend his answer by adding an allegation of breach by the plaintiff of warranty of quantity and quality. The judge, subject to an exception by the defendant, ordered a verdict for the plaintiff, the defendant not contending that the note was not duly executed. In this court the defendant "waived all the defences set up in the answer except that of misrepresentation as to the quality of the bricks sold, and that the consideration, if there was any, failed." *Held*, that the judge must have understood from the statements of the defendant's counsel that he did not rely on the alleged misrepresentation; and therefore that, the defence of breach of warranty not being open under the contract, the ordering of the verdict was right.

At the same trial, there was evidence that the brick were described in a memorandum handed to the defendant by the plaintiff before the sale, as "building or face

brick," and "fire brick," and that they were not of that quality; that the brick were open to inspection and that their quality and condition were apparent; that negotiations for the sale had begun early in the year 1918 and were concluded in July of that year; that the defendant's business was that of buying and selling second hand machinery and junk; that he had had the fullest opportunity to examine the brick and had examined and inspected them; and that the plaintiff, a lawyer, had depended for what knowledge he had concerning the brick upon the caretaker of the premises, who referred to the large brick as fire brick and to the other brick as face brick. *Held*, that a finding would not have been warranted that the plaintiff made fraudulent statements which induced the defendant to purchase the brick and upon which the defendant relied; and, therefore, that the verdict for the plaintiff rightly was ordered.

CONTRACT upon a promissory note for \$3,000, made by the defendants and payable to one Bowen and the plaintiff, a lawyer, and indorsed by Bowen to the plaintiff. Writ dated August 8, 1918.

In the Superior Court the action was tried before *Hammond, J.*

The agreement in writing, referred to in the opinion, excepting the *in testimonium* clause and the signatures, was as follows:

"Know all men by these presents, That we, Charles H. Bowen and Samuel C. Bennett, jointly and individually as our respective interests may appear, in consideration of Four Thousand (4000) Dollars paid by Thomson & Kelley of Boston, Mass., the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer and deliver unto the said Thomson & Kelley the following goods and chattels, namely,

"All brick of every name, nature and description located at Makonikey, Martha's Vineyard, Mass., on property formerly occupied by the Kaolin & Clay Products Company and the Clay Products Company.

"To have and to hold all and singular the said goods and chattels to the said Thomson & Kelley and their executors, administrators, and assigns, to their own use and behoof forever.

"And we hereby covenant with the grantee that we are the lawful owner of the said goods, and chattels; that they are free from all incumbrances; that we have good right to sell the same as aforesaid; and that we will warrant and defend the same against the lawful claims and demands of all persons. . . ."

The amendment to the defendants' answer added the following: "For further answer the defendants say that on July 1, 1918, the plaintiffs sold to the defendants a certain lot of brick located

at Makonikey, Martha's Vineyard; that said plaintiffs represented to the defendants that said brick were of specific grade, namely, face brick and fire brick and that said brick were merchantable; that relying upon the foregoing representation and express and implied warranties the defendants purchased the said brick paying therefor the sum of \$4000.00; which payment¹ was by cash of one thousand dollars and by note of \$3000.00, — which note the plaintiffs are now seeking to enforce as set forth in the Declaration in this action; that the bricks sold were not face brick, building brick, or fire bricks, as represented, and were not merchantable; that said brick is of little value; wherefore the defendants seek to recoup against the plaintiffs the loss and damage suffered by them; the said plaintiff being the payee of said note and not an innocent holder thereof."

The defendants introduced evidence tending to show that the plaintiff and Bowen, previous to the execution of the agreement in writing above described, had handed to the defendants a memorandum on which the brick were described as "building or face brick," and "fire brick," and that the brick were not of that quality.

The colloquy between the judge and the counsel for the defendants, referred to in the opinion, was as follows:

The plaintiff's counsel, in redirect-examination of Bowen, had asked "Did you intend to mislead the defendant?" The defendants' counsel interposed, "Wait a minute." The judge asked, "Do you claim that he did?" The defendants' counsel replied, "I am going to ask the court's permission to amend the pleadings. One of them would be about the warranties." The judge then stated, "You claim misrepresentation in your pleadings." The defendants' counsel replied, "I don't think I ought to be asked to say that openly until the case is in. Whether I claim that or not is for the jury to consider." The judge then ruled, "He may ask him if he intended to mislead, if you are going to claim he did." The defendants' counsel then said, "The Supreme Court ruled — may I read it? — 'Whether statements are made of the speaker's knowledge within the requirements of this test, is a question for the jury.' That has been decided in 127 Mass. It seems to me I ought not to be asked point blank what I personally claim is the whole transaction. I am only

counsel, and the jury is to pass upon that." The judge replied, "The pleadings here indicate you claim there was a misrepresentation. What I am trying to get at is whether you claim that or something else." The defendants' counsel replied, "I intend to amend my pleadings to claim that the goods were warranted up to a certain standard and were not up to that standard."

The judge then stated, "Now if you want to claim breach of a warranty, is that it? What I am getting at is, do you want to withdraw the claim that there was a single misrepresentation?" To this the defendants' counsel replied, "As I say, that is for the jury to say, not for me." The judge rejoined, "No, it is for you to say whether you make the claim or not. It is for the jury to say whether it is justified. Do you make the claim?" The defendants' counsel replied, "Not as the pleadings stand now, but I want to amend the pleadings. I want to amend by adding —" and the judge interposed, "If you simply want to amend by adding, you [addressing the plaintiff's counsel] may put the question, . . . whether he intended to mislead."

It was stated in the record, "The defendants waived all the defences set up in the answer except that of misrepresentation as to the quality of the bricks sold, and that the consideration, if there was any, failed."

Other material facts are described in the opinion.

At the close of the evidence, by order of the judge, the jury found for the plaintiff in the sum of \$3,134.06; and the defendants alleged exceptions.

S. L. Bailen, for the defendants.

W. A. Rollins, for the plaintiff.

CARROLL, J. This action is to recover on a promissory note given by the defendants to Charles H. Bowen and the plaintiff, for certain brick. The terms of sale were contained in a written contract. The defendants alleged misrepresentations of the quantity and quality of the brick by the plaintiff and Bowen, and near the close of the trial the defendants were permitted to amend their answer by alleging a breach of warranty of quality. A verdict was ordered for the plaintiff.

Bowen and Mr. Bennett owned the machinery, rails and equipment, including three hundred and twenty thousand brick designated as building or face brick, some unburned building or face

brick and about one hundred and five thousand fire brick, located at Martha's Vineyard. The machinery was sold to the defendants and under an agreement in writing dated July 1, 1918, the title to the brick passed to the defendants. In this agreement no representation was made as to the amount or quality of the brick, the plaintiff and Bowen transferring all brick of every name and nature and description located at Makonikey, Martha's Vineyard, Massachusetts, on property formerly occupied by the Kaolin and Clay Products Company and the Clay Products Company, and covenanting that they were the lawful owners and that the chattels were free from all incumbrances.

As the contract in writing contained the entire agreement of the parties, it could not be supplemented by oral evidence of a warranty. *Carpenter v. Sugden*, 231 Mass. 1. *Glackin v. Bennett*, 226 Mass. 316. *Edgar v. Joseph Breck & Sons Corp.* 172 Mass. 581, and *North Packing & Provision Co. v. Lynch*, 196 Mass. 204, are not in point. In neither of these cases was the contract of sale in writing. The agreement was oral, and the paper relied on as showing that it was in writing was merely a bill of parcels not designed to set forth all the terms of the contract. It was not a contract in writing and did not prevent the parties from showing all the terms of the bargain, including the warranty. See *Glackin v. Bennett*, *supra*.

The defendants further relied on the alleged misrepresentations of the owners concerning the quality of the brick, asserting that a large part of the brick were not suitable for building or structural purposes, and that many of the fire brick were not merchantable. During the progress of the trial and before the defendants amended their answer by alleging a breach of warranty, the defendants objected to a question asked by the plaintiff. The judge then asked the defendants' counsel if he relied on the claim of misrepresentation, to which counsel replied, "Not as the pleadings stand now, but I want to amend the pleadings." The judge then said that, if the defendants desired to amend by adding (referring to the amendment setting up the warranty), the question might be put. When this question was asked, the defendants, in their answer, denied that they had signed the note, and alleged that it was without consideration and that they were induced to sign the note by the misrepresentations of

the sellers as to the quality and quantity of the brick. The amendment of the defendants, which they then filed, related solely to the sellers' warranty. Under these circumstances we do not think that the question of fraudulent representations is open to the defendants. The judge must have understood, from the statements of the defendants' counsel, that he did not rely on the alleged misrepresentations and the judge was right, therefore, in ordering a verdict for the plaintiff there being no evidence in the case to contradict the agreement in writing.

Furthermore, there was no evidence of any fraudulent misrepresentations made by Bowen or by the plaintiff upon which the defendants relied. The brick were open to inspection and their quality and condition was apparent. Negotiations for the sale began early in the year 1918 and were concluded when the sale was made in July of that year. The defendants' business was that of buying and selling second hand machinery and junk, they had the fullest opportunity to examine the brick and they were in fact examined and inspected by each of the defendants. On the other hand, Bowen had not been in Martha's Vineyard since 1912 and depended on Mr. Bennett for what knowledge he had concerning the brick, and Mr. Bennett relied on the caretaker of the premises, who referred to the large brick as fire brick and the other brick as face brick when speaking of them. Under these circumstances there was nothing to show that fraudulent statements were made by the plaintiff, inducing the defendants to make the purchase, and on which they relied. *Mabardy v. McHugh*, 202 Mass. 148, 151. *American Malting Co. v. Souther Brewing Co.* 194 Mass. 89, 96. *Hillyer v. Dickinson*, 154 Mass. 502, 508. *Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265.

Exceptions overruled.

THOMAS J. LYDON vs. NEW YORK, NEW HAVEN, AND HARTFORD
RAILROAD COMPANY.

Norfolk. March 5, 1920. — April 3, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Railroad. Practice, Civil, Requests, rulings and instructions, Judge's charge.

At the trial of an action against a railroad corporation for personal injuries caused by a collision between a motor car driven by the plaintiff and a locomotive of the defendant at a grade crossing of the railroad with a highway, there was evidence warranting a finding that negligence of the plaintiff contributed to cause the collision, and also that it was caused by neglect of the defendant to give the signals required by St. 1906, c. 463, Part II, § 245. The plaintiff asked that the jury be instructed that, "if the defendant's servants neglected to give the signals required by statute to be given at the railroad crossing, the jury might infer that this neglect contributed to the said injuries." The request was refused, and the jury were instructed that, if they found that the statutory signals were not given, that fact was evidence of negligence, and, if that negligence contributed to the injury, the plaintiff had proved his case so far as the defendant's negligence was concerned. *Held*, that there was no error in the refusal to instruct the jury as requested nor in the instruction given.

TORT for personal injuries received when a motor car which the plaintiff was driving was run into by a locomotive operated by the defendant at a grade crossing of the defendant's railroad and Charles River Road in Needham, the declaration as amended containing two counts, negligence of the defendant being alleged in general terms in the first count to be the cause of the collision, and the second count, alleged to be brought under St. 1906, c. 463, Part II, § 245, setting forth as the cause of the collision "neglect of the defendant to ring the bell or sound the whistle as required by law." Writ dated November 8, 1916.

In the Superior Court, the action was tried before *Dana, J.* Material evidence and exceptions saved by the plaintiff are described in the opinion. There was a verdict for the defendant; and the plaintiff alleged exceptions.

F. P. Garland, for the plaintiff.

J. L. Hall, for the defendant.

CARROLL, J. The plaintiff was injured at a grade crossing by reason of the collision of one of the defendant's engines and an automobile he was driving. The case was submitted to the jury on the second count of the plaintiff's amended declaration alleging that the defendant neglected to give the signal required by St. 1906, c. 463, Part II, § 245. The jury viewed the premises and found for the defendant.

The only question, raised by the plaintiff's bill of exceptions, is to the refusal of the trial judge to instruct the jury that "if the defendant's servants neglected to give the signals required by statute to be given at the railroad crossing, the jury might infer that this neglect contributed to the said injuries." The judge instructed the jury that if they found the statutory signals were not given, this fact was evidence of negligence, and if this negligence contributed to the injury, then the plaintiff has proved his case so far as the defendant's negligence is concerned. There was no error of law in refusing the plaintiff's request and the instructions given were correct.

The jury were not required to find that the failure to give the signals, if they found this to be a fact, contributed to the plaintiff's injury. There may have been other causes which brought about the accident, and the absence of the signals may have in no way contributed to it. It was a question of fact depending on all the evidence and circumstances in the case, whether the defendant was answerable for the plaintiff's injury, or contributed to it in whole or in part. The plaintiff testified that he stopped about forty-five feet away from the crossing and listened for the bell, but did not look in the direction of the approaching train. The jury saw the crossing and its approaches. It was clearly a question for them to determine on all the evidence, if they found that the signals were not given, whether this neglect or the plaintiff's own neglect contributed to the accident. It was open to them to draw the inference that the failure to give the signals had nothing to do with the accident.

In *LaFond v. Boston & Maine Railroad*, 208 Mass. 451, relied on by the plaintiff, it was said, "The jury could have found that the failure to give these signals contributed to the happening of the accident, even though the intestate was somewhat deaf." In *Brusseau v. New York, New Haven, & Hartford Railroad*, 187

Mass. 84, 86, it was stated that the inference to be drawn from the absence of the signals under the circumstances shown, was for the jury; and in *Doyle v. Boston & Albany Railroad*, 145 Mass. 386, the question whether the absence of the signals contributed to the accident was left to the jury, and to the same effect is *Engleman v. Boston & Maine Railroad*, 210 Mass. 179, 181. These cases are not inconsistent with what is here decided. The statement in *Kelsall v. New York, New Haven, & Hartford Railroad*, 196 Mass. 554, that if there was neglect in this particular (neglect in giving signals), the jury might infer that it contributed to the injury, did not require the judge to instruct the jury as requested by the plaintiff. The statement had reference to the facts shown in that particular case and that in view of these facts the jury were warranted in drawing the inference.

There was no error of law in refusing the request and the instructions were correct.

Exceptions overruled.

L. B. BRITTON vs. J. A. GOODMAN & others.

Suffolk. March 10, 1920. — April 5, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Practice, Civil, Parties, Amendment. Attachment, Dissolution by bond.

Where, in an action of contract begun by trustee process against two non-residents as copartners, it appeared that the defendants were not served personally with process but that property in this State had been attached by the trustee process as the property of the defendants, and that a bond had been given by them under R. L. c. 167, § 116, as amended by Sts. 1905, c. 110; 1906, c. 187, to release the attachment, the giving of the bond operated as a general appearance by the defendants, and the action should not be dismissed although no service was made upon them.

In an action of contract against two non-resident individuals as copartners, who appeared generally, the allowance of an amendment joining a third copartner as a party defendant, who is not served with process and who does not appear, does not affect the plaintiff's right to recover judgment against the defendants who had appeared.

CONTRACT, with a declaration on an account annexed to recover commissions on orders secured by the plaintiff and accepted by the

defendants. Writ in the Municipal Court of the City of Boston dated April 14, 1919.

Material pleadings and facts found by the judge in the Municipal Court are described in the opinion.

The defendants filed the following requests for rulings of law:

"1. Upon all the evidence the plaintiff's action should be dismissed.

"2. That there is no property of the defendants within the jurisdiction of this court which could be come at to be attached.

"3. That this court has no jurisdiction over the defendants.

"4. That upon all the evidence the writ in the case at bar should be abated."

The judge denied the rulings, and, upon the plaintiff filing a motion to amend by joining Abraham Goodman as a defendant, the judge allowed the motion, overruled the plea in abatement and, at the request of the defendants, reported the case to the Appellate Division, who dismissed the action. The plaintiff appealed.

A. F. Flint, (*H. P. L. Partridge* with him,) for the plaintiff.

J. B. Jacobs, for the defendants.

BRALEY, J. The record recites the following facts concerning which there is no dispute: The plaintiff on April 14, 1919, sued out of the Municipal Court of the City of Boston a writ of summons and attachment by trustee process in an action of contract wherein he is described as of "said Boston," and the defendants Jacob A. Goodman and Lazure L. Goodman are named as "copartners, doing business as the Goodman Hosiery Co. as the Keystone Knitting Mills and as the Dixie Hosiery Mills and having a usual place of business in Burlington, in the State of N. Carolina," while the trustee, the Commercial Trading Company, is stated to be "a corporation duly established by law and having a usual place of business in Boston aforesaid, in the County of Suffolk." The funds which were alleged to be the property of the principal defendants having been duly attached they dissolved the attachment by giving in due form a bond signed by them as principals and an indemnity company as surety, which having set forth among other recitals that whereas the plaintiff has caused the goods, effects and credits "of said J. A. Goodman and L. L. Goodman in the hands or possession of Commercial Trading Company to the value of fifteen

hundred dollars," to be attached on mesne process in a civil action returnable April 26, 1919, and whereas said defendants wish to dissolve said attachment according to law, stipulated that if within thirty days after the final judgment in said action the defendants should pay the amount, if any, recovered thereon the "obligation shall be null and void; otherwise it shall remain in full force and virtue." The surety and bond having been approved by the plaintiff's counsel, and the writ having been returned into court Jacob A. Goodman and Lazure L. Goodman, the obligors, appearing specially filed a plea in abatement which averred that one Abraham Goodman was a member of the firm who should be joined as a party defendant, and that the action could not be maintained because the "court has no jurisdiction over them," and "there is no property in the Commonwealth of Massachusetts belonging to the defendants Jacob A. Goodman or Lazure L. Goodman individually or as copartners, which has been attached by the plaintiff or can be come at to be attached, but that any property that has been attached by the plaintiff belongs to the aforesaid Jacob A. Goodman; Lazure L. Goodman and Abraham Goodman." The plaintiff accordingly moved to amend by joining Abraham Goodman, whose domicil is alleged to be the same as that of the other defendants, and the motion was allowed.

The case then came on for trial, and the trial judge was asked by the defendants to rule that upon all the evidence the plaintiff's action should be dismissed; that there is no property of the defendants within the jurisdiction of the court which could be come at to be attached; that the court has no jurisdiction over the defendants, and that upon all the evidence the writ in the case at bar should be abated. The judge overruled the plea in abatement, and declined to give the rulings, and at the defendants' request reported his refusal to the Appellate Division which decided that the action should be dismissed, and the plaintiff appealed to this court.

We, are, however, unable to discover any error of law in the proceedings before the trial judge. The attachment appears to have been effectual, and the plaintiff, although no personal service had been made on the defendants, could have recovered a valid judgment to secure the application of the property so attached to

the satisfaction of the judgment. R. L. c. 170, §§ 1, 6, 7. *Lowrie v. Castle*, 198 Mass. 82, 89. *Gahn v. Wallace*, 206 Mass. 39, 42. But by R. L. c. 167, § 116, as amended by St. 1905, c. 110, St. 1906, c. 187, a defendant whose property has been attached on mesne process in a civil action may at any time before final judgment dissolve the attachment by giving bond with sufficient sureties "who shall be approved by the plaintiff or by his attorney in writing, by a master in chancery or by a justice of a court of record if the attachment is made within the jurisdiction of such justice." The bond in the case at bar complies with the statutory requirements, and we assume that it must have been filed with the clerk of the court as required by § 119, and the usual certificate issued, for the record states that the defendants dissolved the attachment by giving an attachment bond. *Wall v. Kelly*, 209 Mass. 370. The attachment having been dissolved by operation of law the plaintiff is remediless in our courts unless a personal judgment can be recovered. It is settled by *Briggs v. McDonald*, 166 Mass. 37, and *O. Sheldon Co. v. Cooke*, 177 Mass. 441, that having given a bond, an instrument under seal, to release their property from attachment the defendants are estopped to deny that an attachment had been made.

The case of *Merriman v. Currier*, 191 Mass. 133, relied upon by the defendants as being to the contrary is not in conflict. That action was a petition inserted in a writ of original summons with an order for attachment as provided in Pub. Sts. c. 192, § 17, now R. L. c. 198, § 17, to enforce a lien on a vessel while the vessel was within the jurisdiction of the court. But no attachment in fact was made. It was there said that, the proceeding being *in rem* and the attachment being wholly inapplicable to the case the bond given to dissolve did not change the character of the action, nor did the bond in any way recognize the validity of the attachment. It refers in its recitals to the process as "purporting to be a process of attachment under the statute," and calls the attachment a "purported attachment." In the present case the attachment was directly applicable to the cause of action. It was the only procedure by which the plaintiff could enforce his claim. And the bond as we have said states and the record shows, that a valid attachment had been made of the defendants' goods, effects and credits which they wished to have released. "The plaintiff, by

instituting his action and making the effectual attachment of property, offers to the defendant the alternative, first, of coming into court generally and settling all issues by submitting to the jurisdiction of the court with the attendant advantage of ending that cause of action by a final judgment, or second, of appearing specially and protecting only the property attached and settling only that question and nothing else." *Cheshire National Bank v. Jaynes*, 224 Mass. 14, 19. The defendants might have taken the latter course, but, having obtained and enjoyed the benefits conferred by the bond voluntarily made and delivered, and which could not have been availed of without recognizing the attachment and submitting themselves to the jurisdiction of the court from which the writ issued, their acts should be held as having the effect of a general appearance. *Peebles v. Weir*, 60 Ala. 413. *Chastain v. Armstrong*, 85 Ala. 215. *Shields v. Barden*, 6 Ark. 459. *Cole v. Reilly*, 28 Ga. 431. *Brenner Trucks & Co. v. Moyer*, 98 Penn. St. 274. *Butcher v. Cappon & Bertsch Leather Co.* 148 Mich. 552. *Richard v. Mooney*, 39 Miss. 357. *Sharpe v. J. W. Morgan & Co.* 144 Ill. 382. *First National Bank of Arcadia v. Johnson*, 130 La. 288. *Barry v. Foyles*, 1 Pet. 311.

The amendment joining Abraham Goodman does not affect the plaintiff's right to recover judgment against the defendants who had appeared. The declaration is on an account annexed to recover commissions on orders secured by the plaintiff, and accepted by the defendants. A contract by copartners within the scope of the firm's interests or business binds all and each of them. *Allen v. Wells*, 22 Pick. 450. *Ashley v. Dowling*, 203 Mass. 311. *Trenton Potteries Co. v. Oliphant*, 13 Dick. 507. *Amis v. Smith*, 16 Pet. 303. And under R. L. c. 177, § 6, although the action as amended is against three persons as partners, while only two can be held, as Abraham Goodman not having been served with process or appeared generally is not within the jurisdiction of the court, yet judgment may be entered against Jacob A. Goodman and Lazure L. Goodman alone, and no amendment of the declaration is required. "The legal effect of the statute is, that such discrepancy between the contract declared on, and that proved, shall be deemed no variance." *Wiggin v. Lewis*, 12 Cush. 486. *Taft v. Church*, 162 Mass. 527, 533. *Monk v. Parker*, 180 Mass. 246, 249. See *Phelps v. Brewer*, 9 Cush. 390.

It follows that the decision of the Appellate Division must be reversed and the decision of the single judge must stand. *Loanes v. Gast*, 216 Mass. 197, 199, 200.

So ordered.

MARY L. RYDER vs. BROCKTON SAVINGS BANK & another.

Plymouth. March 10, 11, 1920. — April 5, 1920.

Present: RUGG, C. J., BRALEY, PIERCE, & JENNEY, JJ.

Equity Jurisdiction. To redeem from mortgage. *Mortgage.* Of real estate. *Husband and Wife.* Dower. *Attachment.*

A wife, who, for the purpose of releasing her rights of dower and homestead and rights given her by statute, joined with her husband in a mortgage of real estate owned by him, may maintain a bill in equity to redeem the real estate from the mortgage.

A wife's inchoate right of dower in real estate of her husband gives her no right to maintain a bill in equity to redeem real estate of his from a mortgage made by him in which she did not join.

While one, who has an attachment upon real estate subject to a mortgage, has a right to redeem from the mortgage, if, without making to the mortgagee any tender of the amount due upon the mortgage obligation, he permits the property to be sold at a sale duly conducted in execution of a power of sale in the mortgage deed giving the mortgagee the privilege of becoming a purchaser at the sale, his right of redemption is lost, although he attended and was a bidder at the sale and the mortgagee became the purchaser.

A sale in foreclosure of a mortgage of real estate is not rendered invalid by the facts, that the mortgagee was actuated by the purpose and intention, not merely of procuring what was due him under the mortgage but also of procuring the property as his own and of excluding both the mortgagor and his wife therefrom, both when he took the mortgage, in which the mortgagor's wife did not join because she was estranged from him, and later when, upon foreclosure under a power of sale which gave him the privilege of purchasing at the foreclosure sale, he outbid the wife at the sale and purchased the property.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 10, 1919, against the Brockton Savings Bank and one Merton F. Ellis, in which the plaintiff alleged in substance that the plaintiff's husband, Henry H. Ryder, had made three mortgages of real estate on Main Street in Brockton to the defendant bank and that she had joined therein for release of her dower and homestead rights and other rights by statute; that

at some time after the giving of those mortgages the plaintiff and her husband became estranged and, while they were so estranged, the husband gave to the defendant Ellis a mortgage of the same premises for \$5,000, in which she did not join; that on December 22, 1917, the defendant Ellis entered upon the premises for purposes of foreclosure and that on January 18, 1918, the premises were sold at a sale under the power of sale in his mortgages for \$8,000, subject to the mortgages to the defendant bank, and that he became the purchaser; that a default of the conditions of the mortgages to the defendant bank had occurred, and that the bank had begun foreclosure proceedings. Material prayers of the bill were that the defendant bank be restrained from proceeding with the foreclosure sale; that the defendant Ellis be required to account for the income and profits from the property and therefrom to satisfy the conditions of the mortgages to the defendant bank; that the "defendant Ellis,—if it be found that he refrained from paying the instalment of interest now in default with said defendant bank for the purpose of causing the proposed foreclosure, in order, fraudulently, to deprive the plaintiff of her dower right, and such other rights as she may have in the premises,—be directed and ordered to convey his equity of redemption in the premises to the plaintiff, or" that the "defendant Ellis,—if it be found that he refrained from paying the instalment of interest now in default with said defendant bank, for the purpose of causing the proposed foreclosure, in order, fraudulently, to deprive the plaintiff of her dower right, and such other rights as she may have in the premises,—be directed and ordered to relinquish to the plaintiff possession and management of said premises; and that if it becomes necessary to place another mortgage or mortgages to replace those now held by the defendant bank, that the defendant Ellis be directed and ordered to transfer his title to said property to the plaintiff, temporarily, for the purpose of replacing said mortgages."

The bill was referred to a master. Pending hearings before the master, the plaintiff was allowed to amend her bill to add allegations to the effect that the defendant Ellis's course of conduct in the premises had been to carry out an intention on his part, conceived before he took the mortgage from the plaintiff's husband, to get possession of the property as his own, and that, when he

began foreclosure proceedings on his mortgage, no breach of the mortgage had occurred. The amendment also added prayers seeking in effect that there should be an accounting between the defendant Ellis and the plaintiff's husband, and that, upon payment to Ellis of the amount thus found due, his mortgage should be discharged.

The master filed a report, and both the plaintiff and the defendant Ellis filed objections and exceptions thereto. Material facts found by the master are described in the opinion. The suit then was heard by *Crosby, J.*, by whose order an interlocutory decree was entered overruling the plaintiff's exceptions to the master's report and sustaining some of the defendants' exceptions, which are not now material. On the matter of a final decree, the single justice filed the following memorandum:

"The plaintiff's husband, Henry H. Ryder, gave to the defendant bank three mortgages, described in the bill, conveying a certain parcel of land in Brockton. He subsequently executed to the defendant Ellis a fourth mortgage upon the same land. The plaintiff joined in the three mortgages to the bank and executed each of them in release of her dower interest in the premises conveyed. Upon the findings of the master, it appears that, at the time when the bank began proceedings for the foreclosure of the three mortgages held by it, there was a breach of the conditions of the mortgages and that the bank is legally entitled to foreclose. The master finds, and it is agreed, that the plaintiff did not join in the fourth mortgage given by her husband to the defendant Ellis but that the property therein described was conveyed subject to the plaintiff's right of dower. I am of opinion and rule that, as the plaintiff did not release her right of dower in the mortgage given by her husband to the defendant Ellis, her inchoate right of dower remains unimpaired and that she is not entitled to maintain the bill against Ellis. I also rule that, if the bill is to be treated in part as a bill to redeem from the mortgages held by the bank, the plaintiff could maintain a bill for that purpose if she had paid or tendered to the bank the amounts severally due and payable on the mortgages and had tendered the performance of the other conditions contained therein; but, as she has neither paid nor tendered such amounts nor offered in the bill to make such payments, she is precluded from maintaining the bill against the bank.

It follows that a final decree is to be entered dismissing the bill as amended as to each defendant, without costs."

Thereafter, the plaintiff was permitted further to amend her bill by adding allegations that she was ready and willing and offered to pay what was due, both upon the mortgage held by the defendant bank and upon the mortgage given by her husband to the defendant Ellis, and by adding prayers that she be allowed to pay such sums and to redeem the mortgages.

The single justice then reported the suit to the full court for determination upon the pleadings, as amended, the master's report, the exceptions thereto and the memorandum and order for a decree.

M. H. Sullivan, for the plaintiff.

C. G. Willard, for the defendant Ellis.

A. F. Barker, for the defendant bank.

BRALEY, J. The plaintiff, the wife of the mortgagor Henry H. Ryder, having joined releasing dower in the mortgages, three in number, given by him on his real property to the defendant bank, the foreclosure of which had been begun when the bill was filed but has been suspended during the litigation, can maintain the bill as amended for leave to redeem. *Newhall v. Lynn Five Cents Savings Bank*, 101 Mass. 428, 430. *Fitcher v. Griffiths*, 216 Mass. 174. R. L. c. 187, § 22.

But, a fourth mortgage having been given to the defendant Ellis, who as between himself and the bank is a second mortgagee, which has been foreclosed by Ellis under the power of sale, the plaintiff, who did not join in the mortgage, also claims that she is entitled to redeem from this mortgage, because, the equity of redemption being extinguished by the foreclosure, subrogation to the rights of the bank will not furnish any protection against the complete destruction of her dower rights. A wife, even after a sale of the mortgaged premises where she joins in the mortgage, may, during the life of her husband, bring a bill to redeem and test the validity of the foreclosure, for if the foreclosure stands her inchoate right is lost. *Pierce v. Chace*, 108 Mass. 254. *Kopp v. Thele*, 104 Minn. 267. *Mackenna v. Fidelity Trust Co.* 184 N. Y. 411. It is true that the right rests on marriage and the seisin of the husband through whom the wife acquired an interest in the premises which she can protect only by redemption. If she re-

deems, the husband's title is not transferred to her, although by subrogation she succeeds to all the rights of the mortgagee. *Kopp v. Thele*, 104 Minn. 267. It is plain, however, that the fourth mortgage is not an incumbrance on her right to dower: a right inhering not merely in the equity of redemption but in the entire property subject to the mortgages to the bank. The plaintiff, if she survives her husband and the bank's mortgages are not foreclosed, can demand and have her dower assigned even if there has been a foreclosure of the fourth mortgage. If she needs no protection because her rights have not been invaded, there is no sufficient ground on which equitable relief can be granted. *Opdyke v. Bartles*, 3 Stockt. 133. It appears from the master's report that when all the mortgages have been satisfied the equity has a very substantial value, and if the foreclosure is not set aside the defendant Ellis, who purchased at the sale in foreclosure of his own mortgage, can redeem from the prior incumbrances. It may be that he does not intend to, for the record shows that he urged the bank to foreclose, with the apparent intention of purchasing at the sale and thereby obtaining an unincumbered title. But, while the position of the plaintiff is unfortunate owing very largely to vexatious marital conditions, we cannot create in her behalf a legal or equitable right where fundamentally none exists.

The record states that at the date of foreclosure the property was subject to an attachment for her sole benefit under the provisions of an agreement of separation and of support entered into between herself and husband through the medium of a trustee. The action brought in the name of the trustee is still pending, and she further contends that, to protect and save her rights thereunder, redemption should be decreed. *Briggs v. Davis*, 108 Mass. 322, 323. See *Newell v. Hadley*, 206 Mass. 335. An attaching creditor undoubtedly stands in the position of a purchaser for value. *Priest v. Rice*, 1 Pick. 164. *Coffin v. Ray*, 1 Met. 212. *Woodward v. Sartwell*, 129 Mass. 210, 212. *Waltham Co-operative Bank v. Barry*, 231 Mass. 270, 273. But even if it be assumed that a lien on the land subject only to the mortgages was acquired which she can enforce, the sale and conveyance under the power would pass an indefeasible title to the purchaser, cutting off all right of redemption by the mortgagor, or any one claiming under him. The power of sale provides that "upon any default in the per-

formance or observance of the foregoing condition or any condition in any prior mortgages" the mortgagee may foreclose, and, it being plain on the record that the interest due the bank and the taxes were in arrears, there was a breach which warranted the foreclosure of that mortgage. It would follow that, as no execution could be levied on the land by force of an attachment subsequent to the mortgage, the sale under the power converted the land into money which is to be applied first to the satisfaction of the mortgage, and that any surplus remaining belongs to the same person as the land before the sale. *Wiggin v. Heywood*, 118 Mass. 514, 516.

The plaintiff to overcome this difficulty presses the argument that the lien of the attachment has not been lost. The duties resting upon a mortgagee when he institutes foreclosure proceedings have been so recently defined as not to require repetition. *Bon v. Graves*, 216 Mass. 440, and cases there cited. It is found that "the formalities of the sale were in accordance with the provisions of the power of sale contained in the mortgage." The plaintiff attended and bid at the sale, but her bid cannot be treated as a tender or offer to redeem. It was merely an announcement in response to the call of the auctioneer of the amount she was willing as a purchaser to pay for the property. It lacked the necessary incidents of a tender, which if properly made and accepted would have prevented the sale, or, if refused, would have rendered the foreclosure invalid. The subsequent findings, that on all the evidence "the defendant outbid Mrs. Ryder because his primary purpose in selling the property under the power of sale in the mortgage was not to receive the money due him under his mortgage, but to retain possession and control of the property, and that he intended to prevent Mrs. Ryder as well [as] Mr. Ryder from owning the property because he wished to own it himself," are insufficient to invalidate the sale. The power permitted him to buy for himself if he were the highest bidder, and his desire to make as much money as possible by outbidding the plaintiff was not of itself blameworthy in the absence of any evidence showing bad faith in the exercise of the power. *Pilok v. Bednarski*, 230 Mass. 56, 58.

The result is that a decree for redemption is to be entered as to the mortgages held by the bank, the terms and conditions of which

are to be settled by a single justice, but that, as to the defendant Ellis, the bill is to be dismissed without costs.

Ordered accordingly.

WILFRED W. DAVIS vs. BOSTON ELEVATED RAILWAY COMPANY.

Norfolk. November 14, 17, 1919. — April 6, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, PIERCE, & JENNEY, JJ.

Practice, Civil, New trial, Findings of fact by judge. *Words*, "Memorandum of Decision," "Material," "Artifice."

A judge in denying a motion for a new trial of an action at law need not make any findings of fact.

Upon exceptions in an action at law, where it appeared that, in denying a motion for a new trial, the judge had filed a paper entitled a "Memorandum of Decision," it was *stated* that the paper was called so improperly.

While a paper, entitled a "Memorandum of Decision," filed by a judge accompanying an order denying a motion for a new trial of an action at law, ordinarily would form no part of the record upon exceptions taken to the order, where the paper expressly was made a part of the bill of exceptions, its contents were held to be before this court in every material aspect.

Statement, by RUGG, C. J., of the controlling principles of law respecting the granting of motions for new trials on the ground of newly discovered evidence.

The determination of a motion for a new trial of an action at law on the ground of newly discovered evidence rests within the sound judicial discretion of the trial judge.

At the trial of an action against a street railway company for personal injuries resulting from a foreign substance entering the plaintiff's eye coincidentally with an explosion upon or under a street car of the defendant, the plaintiff contended that the foreign substance was metal that blew out from a fuse box on the car, and the defendant contended that it was a bullet from a cartridge placed upon the track by a third person. The jury found for the plaintiff. The defendant moved for a new trial on the ground of newly discovered evidence which would tend to prove that, within forty-eight hours after the accident, a Roentgen ray photograph of the plaintiff's eye was taken, which revealed that the foreign substance was a bullet and not part of a fuse box. The motion was extensively heard twice and was considered at length by the trial judge, who denied it mainly on the grounds, that he did not place reliance upon the testimony of a witness, who first called the defendant's attention to the Roentgen ray photographs and who had taken the photographs, that he was not satisfied that the photographic plates were sufficiently identified as pictures of the plaintiff's eye and that the testimony of the witness was not of sufficient weight to lead his mind to the conclusion that it would have an effect to lead the jury to a verdict more favorable to the defendant in case a new trial was granted. There was evidence warranting the conclusions of the judge. *Held*, that the determination

of these facts by the judge was not subject to revision, and that his denial of the motion was proper.

In denying the motion for a new trial in the circumstances above described, the judge filed a statement of further findings, among which was a finding that the evidence was not newly discovered, that the evidence was cumulative, and that "artifice was practised" in the production of the photographic plates, which findings were made without supporting evidence; and from the statement it appeared that there were other inconsistencies in the findings of the judge; but it was *held*, that these errors did not affect nor vitiate the judge's main decision, that he could not place reliance upon the testimony which was relied on by the defendant to identify the photographic plates as pictures of the plaintiff's eye, and that the record showed no abuse of judicial discretion.

The action above described was twice tried. At the first trial, a physician called by the plaintiff testified that "There evidently was an X-ray taken of" the plaintiff's eye within three days after the accident. At the second trial, nine months later, the same witness testified, "An X-ray record shows that there was a foreign body in his eye of some sort." There was a verdict for the plaintiff at the second trial and exceptions of the defendant were overruled two years after the first trial. Within a month thereafter the motion for a new trial, above described, was filed. The judge found that the defendant failed in the exercise of due diligence to discover the evidence on which he relied in his motion. *Held*, that the finding was not without support in the evidence.

It is not error for a judge, who, upon the denial of a motion for a new trial, filed a statement of facts upon which he relied in so doing, to withdraw such statement from the files and two months later to restore it, after, upon a rehearing of the motion, he has affirmed his former action.

TORT for personal injuries sustained by the plaintiff on July 6, 1912, from being struck in the left eye by a piece of metal alleged to have been thrown from the defendant's car by reason of an explosion of a fuse box. Writ dated August 6, 1912.

In the Superior Court, the action first was tried before *McLaughlin, J.*, when the jury found for the plaintiff in the sum of \$1,000. On motion by the defendant, the verdict was set aside on the ground that it was against the evidence and the weight of the evidence, and a new trial was ordered.

At the second trial, which was before *Irwin, J.*, the jury found for the plaintiff in the sum of \$15,000, and exceptions by the defendant were overruled by this court on January 28, 1916, in an opinion reported in 222 Mass. 475. On February 10, 1916, the defendant filed a motion for a new trial on the ground of newly discovered evidence. The motion was heard on March 4 and on April 8, 1916, and was denied on November 14, 1916, the judge making formal findings and rulings in a paper called a "Memorandum of Decision." In substance, these were as follows:

"The defendant in the above entitled case moves that the verdict of the jury be set aside and a new trial ordered upon the ground of newly discovered evidence. The defendant's motion is bottomed upon certain affidavits and X-ray pictures thereto attached. At the hearings thereon, the motion was opposed by the plaintiff. The parties were heard at length on two occasions. I have examined into the history of the case and considered all the matters and things that have been submitted to me, touching upon the defendant's motion.

"1. No authorities are required to verify the legal principle that where a trial of a cause has obviously resulted in a miscarriage of justice the court has the right to set the verdict aside; it not only has that right but in the performance of its duty it is bound to do so. It is an equally sound legal doctrine that courts are very cautious how they overthrow verdicts that are resultant of an exhaustive and deliberate trial of the issue presented. If our courts were to lightly regard the verdicts of juries and in off-hand fashion set them aside the result would be a complete subversion of our legal procedure.

"Now, as to the motion here presented.

"The defendant bases its contention that its motion to set aside the verdict and order a new trial ought to be granted upon the discovery in the way of affidavits attached to the motions, of three X-ray plates 'taken of the plaintiff's eye' shortly after his injury. The plaintiff received his injury on July 6, 1912. The X-ray examination of his eye is said by the affiant, Dr. Liebman to have been made by him on July 8, 1912, 'at the request of the physician in charge' at the Massachusetts Eye and Ear Infirmary. The hospital records of the case which were presented in evidence at the trial contain no reference of X-ray plates having been made. Dr. McDonald, the surgeon who performed the operation of removing the substance from the plaintiff's eye says in his affidavit: 'Neither at or before the time of the last trial had I any knowledge of the existence of X-ray plates showing the character of the foreign substance lodged in Davis' eye. I first learned that X-ray plates were in existence since the verdict had been rendered on the second trial.' While Dr. Liebman says that the plates were made 'at the request of the physician in charge' they appear to have served no valuable use, as no such fact was noted in the hospital records

nor were the plates submitted to Dr. McDonald, the master surgeon in the case. As relating to the surgical or legal phase of the plaintiff's case the X-ray plates appear for the first time on February 2, 1916, the date that Dr. Liebman telephoned to Mr. Pinanski saying 'I have three plates now in my possession . . . and you are welcome to see them if you choose' (Mr. Pinanski's affidavit).

"The hospital record of August 16, 1912, states 'Operation removed F. B. [interpreted by hospital official as meaning foreign body] from sclera and conjunctiva.' Does it require the aid of an X-ray lens to identify a cartridge bullet? From school-boy to man are not all among us familiar with the attributes of such a thing? Would there have been any hesitation in the two surgeons who removed the metal in recognizing it as a bullet? Yet of the several witnesses who gave to the jury a minute description of the metal that they had seen and handled no one of them, on examination and cross-examination, said the thing was a bullet.

"Properly verified X-ray plates are admissible in evidence in the trial of cases when they are deemed to have a tendency to aid the court and jury to determine the issue being tried. The plaintiff in this case contended at the hearings on the defendant's motion that the prints made from the X-ray plates in question here do not portray the substance which was in his eye at the time that the plates are alleged to have been made, and presented evidence in support of this contention.

"Roland Chester McKenzie, of Waltham, physician and surgeon who has made a special study and practice of ophthalmology, and has been connected with the Massachusetts Charitable Eye and Ear Infirmary since January, 1911, presented at the hearing by the plaintiff, testified in effect as follows:

"These X-ray photographs do not represent the condition of the plaintiff's eye as it is described and recorded in the hospital records made at the time of his treatment there. The hospital record of July 7, 1912, when the plaintiff was admitted, shows a perforation of the inner upper side of the globe and abrasion near the nasal side. The chart and pictures show the object in the outer lower side of the globe. On August 16, 1912, date of the operation, the hospital record states that 'Examination showed at

inner part of the globe a perforation in the sclera and conjunctiva and piece of metal could be seen.' It would have been absolutely impossible for the foreign body to have moved from the place where the hospital record states it to have been to the point where this chart and these pictures represent it to have been. The metal adhered to the eye. Again, the record of August 16, 1912, states that the 'eye turned outward.' Now, if the foreign substance were in the outer lower globe where the chart and picture represent it to have been, the eye would have been turned inward during the operation.

"It is the practice at the hospital in such cases as this, to note in the records of every case, anything that admits of a specific description. In the Davis case the record speaks only of 'F. B.' in the eye, meaning foreign body; it nowhere makes mention of a bullet.

"Shortly before March 4, 1916, the witness saw the X-ray plates in this case which then appeared to have been recently *passed partouted*, and the words 'Large Bullet' written thereon in a fresher, newer ink than the rest of the inscription. At the time that the plaintiff was treated at the hospital, it was not the practice to *pass partout* plates.

"The witness did not know until recently that the X-ray plates had been taken from the hospital to Dr. Liebman's office.

"Dr. A. E. O'Connell, of St. Vincent Hospital, Worcester, qualified as a Roentgen-ray specialist, had made more than six hundred X-ray plates during the past nine years presented by the plaintiff, testified in substance as follows:

"The location of a foreign substance in a human eye, as shown in these X-ray pictures, is entirely different from its location as stated in the hospital records. The chart and pictures here represent the foreign body to be in lower left or outer quadrant of the eye; the hospital records state it to have been in the upper inner quadrant of the eye. Radiograms or X-ray pictures are not pictures of the objects themselves, but of their shadows. The outlines of the object represented in these pictures are sharper, more distinct than he had even seen in any X-ray photograph, during his professional experience and observation.

"Asked if it were possible to artificially produce an X-ray plate or to alter, in a material way, an existing plate and the fact that

this had been done beyond detection, the witness replied, A person experienced in X-ray work could easily invent an original plate to represent what he chose to have it picture; and he could, by painting or touching up an existing plate, and then photographing it, produce a negative which would defy detection of the counterfeit.

"The evidence of these two doctors was not disputed nor in any way qualified by the defendant. Upon a consideration of all that was laid before me during the hearings upon the defendant's motion I am not satisfied that the pictures produced by Dr. Liebman and attached to the defendant's motion are sufficiently verified to make them worthy of credence. On the contrary, in view of all the circumstances attending the appearing of the X-ray plates and the pictures printed therefrom, and the evidence of Doctors McKenzie and O'Connell, I am quite satisfied that artifice was practised in the producing of the plates and that they do not truthfully represent the substance that was taken from the plaintiff's eye by Doctors McDonald and Haskins.

"There is nothing here that is intended to asperse in any degree the good faith of the defendant's attorney of record, Mr. Blackmur, or of his immediate superior in the defendant's law department, Mr. Sears. Neither by direct statement nor insinuation has any person said or suggested anything tending to impute to these attorneys any unworthy acts in this matter. There is no question in my mind but that their information as to the existence of the X-ray plates came to them in the way of their affidavits attached to the motion.

"2. Moreover, the alleged newly discovered evidence is not seasonably presented. Due diligence would have discovered it, if it existed before the trials of the case; as shown by the court docket entries, the case was entered September 3, 1912, tried to a jury February 5, 1914. The defendant's motion for a new trial was allowed April 4, 1914, the second trial was had October 26, 1914. I have discovered nothing in the conduct of any person connected with the case that tends to show that the defendant was misled or deceived in any way touching upon the existence of X-ray plates. But, per contra, Dr. McKenzie, eye specialist, a witness called by the defendant at the first trial of the case, testified during the presenting in evidence of the hospital records: 'There evidently

was an X-ray taken on July 8th. The X-ray really doesn't mean much.' Again, the same doctor called as a witness by the plaintiff at the second trial produced the hospital records and testified, 'An X-ray record shows that there was a foreign body in his eye of some sort.' These statements should have nudged the defendant to painstaking search for the result of the X-ray examination of the plaintiff's eye if it intended ever to rely upon it.

"I find and rule that the defendant failed in the exercise of due diligence to discover the testimony which it now offers in support of its motion.

"3. Furthermore, viewing the evidence that is now offered in a light most favorable to the defendant, it is merely cumulative. It would introduce into the case nothing unique; it presents no new element. The case was defended upon the theory that the substance taken from the plaintiff's eye was a bullet. The object was minutely described to the jury by the various witnesses who saw, who handled and who examined it, some of whom were men of more than the average intelligence, among them being two surgeons who extracted it from the plaintiff's eye and the chemist who assayed it. A most detailed word-picture of the bit of metal was presented to the court and jury, expressive of its every attribute. The proposed newly discovered evidence in nowise tends to disclose the source of the alleged bullet, excepting only by invoking the remote and speculative inferences that the plaintiff's injury resulted from the explosion of a cartridge upon the railway tracks, which theory was fully spread before the jury during the trial. The issue in this case was presented to the jury in a clear cut fashion . . . [Here followed a review of instructions given to the jury at the second trial to guide them in determining that issue.] . . . The jury visited the locus of the injury; they examined the fuse box of a type of car similar to the one from which the plaintiff was said to have received his injury; they saw and heard the testimony of the various witnesses; they listened to the argument of proficient and efficient counsel; they attended closely the instructions of the court, and upon a consideration of all this, rendered their verdict. Whatever the shape, size or substance of the metal found in the plaintiff's eye, the jury were warranted in deciding that it came from a fuse box of the defendant's car in the way of the plaintiff's evidence. There were several physical facts attending

the incident of the plaintiff's injury that were of more than mere passing persuasive force, that the metal which caused his hurt proceeded from a car of the defendant company, and from no place else. The plaintiff was standing at a station provided for the patrons of the defendant; while there and about six feet in from the edge of the station platform the car in question came to the station and stopped, he then being about opposite to the middle of the car. Shortly 'the car started up and it gave a kind of a jerk and stopped and there was a flash and a bang and some smoke;' there was a loud report, smoke and flame. 'Coincident with the report of an explosion and its accompanying smoke and flame the plaintiff was hit in the eye; then and there the substance in question entered his eye and he received the injury complained of.' Immediately, 'about a minute,' before this car approached the station, another car had come to and gone from the station on the same tracks and in the same direction that this car was proceeding. This fact, coupled with the further fact that an immediate search disclosed no cartridge shell in the vicinity of the station would seem to be a complete answer to the suggestion that the plaintiff's injury might have been caused by the exploding of a cartridge in the tracks upon its being run over by the car. There was evidence tending to show that directly after the report of the explosion a man was seen doing something to the car at the place whence the smoke and flame had come. One witness saw 'a man in uniform getting down under the car where the flames came from, his hands underneath the car.'

"Litigants are entitled to their deliberate day in court. They should then and there present their entire case. It is no reason for a new trial that one or for that matter that both of the parties may be heard to a better advantage and the facts and principles involved may be more carefully considered. As before stated, this case was presented to the court and jury with ability and zeal, by attorneys studied and practised in the law. It was submitted to an intelligent, fair and impartial jury, and I cannot conceal from myself the deep-seated opinion that the jury were warranted in finding the verdict they returned. Rarely, if ever, is a case tried in the courts to the complete satisfaction of the parties thereto. Something is usually done or omitted that they later think ought to have been otherwise. The defeated party is con-

fidant that he would fare better in a retrial of the issue. Touching upon the matter of granting new trials on the ground of newly discovered evidence one of our ultimate courts has said, 'Motions of this kind are received with great caution, because there are few cases tried in which something new may not be hunted up.'

"The parties to this action have had their deliberate days in court. The issues involved have been passed upon and adjudicated. Legal process should some time reach its end and then quit; it ought not to proceed *ad libitum* of parties.

"In the exercise of my discretionary judgment, the defendant's motion for a new trial is overruled."

The foregoing statement by the judge of the grounds for his action in denying the motion for a new trial at the first hearing, originally was filed on January 20, 1917, later was withdrawn and on October 18, 1917, after the rehearing on the motion and the reaffirmation of his former order, again was filed by him "as of November 14, 1916."

On November 18, 1916, the defendant petitioned for a rehearing of his motion for a new trial. The petition was granted, and the rehearing was held on January 20 and on March 10, 1917. At that hearing, the defendant presented twenty-four requests for rulings, all of which were granted excepting the following, action of the judge thereon being stated after each request:

"4. On all the evidence adduced on the present motion the inference is not warranted that the defendant has been guilty of such negligence as to disentitle it to rely upon the alleged newly discovered evidence." The judge ruled, "Construed to be a question of both, and request for ruling refused."

"15. On all the evidence presented at the hearing and rehearing of this motion, the inference is not warranted that the X-ray pictures relied upon by the defendant are not pictures of the foreign body alleged by the plaintiff to have entered his eye." The judge ruled, "Question of fact and a ruling refused."

"23. On this motion the defendant is entitled as matter of law to findings of fact by the court on the following questions:

"A. Does the newly discovered evidence relied upon by the defendant actually exist?" The judge found, "The certain X-ray plates mentioned in the defendant's motion do exist."

"B. Can said newly discovered evidence be produced by the

defendant at a new trial of the case?" The judge found, "Said plates could be produced."

"C. If produced would it be likely to change the result of the former trial?" The judge found, "No."

"D. If said alleged evidence does exist, has the defendant been guilty of any negligence in not producing it at either of the former trials of this case?" The judge found, "Yes, if such evidence were in existence, due diligence would have discovered it."

"E. Did the plaintiff or either of his counsel at either of the trials of this case know from an inspection of the plates of said X-ray pictures or otherwise, that said X-ray pictures showed a foreign body such as is shown in the pictures now presented by the defendant as the basis for this motion?" The judge found, "There is no evidence that either of them did."

"F. Are the X-ray pictures now relied upon by the defendant in fact pictures of the foreign body that injured the plaintiff's eye before it had been removed from the plaintiff's eye?" The judge found, "I am not satisfied that they are."

"G. Was the reason why the plaintiff or his attorney or attorneys caused an analysis of said foreign body to be made by a chemist after it was taken from the plaintiff's eye a desire by annihilating said body or destroying its shape to prevent it from being shown to the jury at either trial of the cases?" The judge found, "There was no evidence presented that would warrant a finding that such a reason existed."

"H. When did the defendant through any of its counsel or agents first know that the X-ray picture had been taken showing the shape of the foreign body in the plaintiff's eye?" The judge found, "The affidavits of the defendant's counsel as to when information of the existence of the X-ray plates in question came to them were not disputed and their statements as to this are found to be true."

"I. Has the defendant been guilty of any laches or unreasonable delay in bringing its alleged new evidence to the attention of the court since the last verdict was rendered?" The judge found, "No."

"J. Did the defendant's counsel in fact appreciate the importance of the statements made by Dr. Roland C. McKenzie at either of the trials in this case concerning an X-ray picture?" The judge

found, "I don't know. Perhaps he ought to have. This interrogatory is too speculative to admit of a finding of fact by the court."

"K. Did the defendant's counsel at any time prior to the termination of the last trial of this case know or understand that an X-ray picture had been taken which would show the shape of the foreign body that injured the plaintiff's eye in such sense as to be of material assistance in determining the source from which said foreign body came?" The judge found, "I have no means of knowing the counsel's knowledge or understanding as to this. He says he didn't and I believe him."

Besides the rulings and findings above described, the judge filed a paper called a "memorandum," reading in substance as follows:

"Much of the testimony presented at the rehearing tends to confirm rather than qualify the decision previously made. For example, the witness and affiant, Dr. William Liebman, admitted that the indorsement on the jacket containing his original X-ray plates was made, not at the time that the plates were made, as stated in his early affidavit, but a year or more thereafter. His admission made at the rehearing that the plates do not represent the condition of the plaintiff's eye with respect to the position of the foreign body therein, confirms the finding of the court, that the X-ray plates were not sufficiently verified to make them worthy of credence — although Dr. Liebman knew since the day after he made them that the plates were erroneous, that fact was not acknowledged until after the court had discovered it at the previous hearings on this motion.

"Without going further into exhaustive detail than has heretofore been done, I am satisfied that I was not misled as to any facts material to my decision on this motion.

"After again carefully considering all matters that have come before me touching upon the entire case, and an examination of the various exhibits presented, including the X-ray book wherein Dr. Liebman recorded his X-ray plates, all the affidavits and counter-affidavits, and having heard the oral testimony of some of the principal affiants, I find that the proposed new evidence is not newly discovered; that it is cumulative; that it is not in point of character, weight or credibility, sufficient in the exercise of judicial discretion, to justify a disturbance of the verdict, or change my decision of the motion.

"Moreover, viewing the case in its entirety, I am of opinion that if the alleged newly discovered evidence could be deemed to be newly discovered and not to be cumulative, the motion should be denied as matter of discretion.

"The defendant's motion for a new trial is overruled."

Other material evidence and rulings of the judge are described in the opinion.

The motion was denied; and the defendant alleged exceptions.

W. G. Thompson & P. R. Blackmur, (*S. Gottlieb* with them,) for the defendant.

D. J. Gallagher, (*S. Bishop* with him,) for the plaintiff.

RUGG, C. J. This case comes before us on the defendant's bill of exceptions to proceedings had upon its motion for setting aside a verdict in favor of the plaintiff. The action is in tort for personal injuries alleged to have been received by the plaintiff through the blowing out of a fuse on one of the defendant's cars, whereby a piece of lead was projected into his left eye. One defence was that the injury was caused by a bullet. It was conceded by the plaintiff that the defendant was not liable if that were the cause. The first trial to a jury resulted in a verdict for the plaintiff. That verdict was set aside on the ground that "the weight of the evidence supported the contention of the defendant that on the occasion when the plaintiff suffered his injury no fuse was blown out and that the accident was due to some other cause." At the second trial a verdict was returned for the plaintiff. The cause came to this court on the defendant's exceptions, which chiefly raised the question whether as matter of law there was any evidence to support a finding for the plaintiff. Although recognizing it as a close case, the court were of opinion that enough evidence was presented to require the submission of the case to the jury, and the exceptions were overruled. Thereafter, a motion for a new trial was filed by the defendant on the ground of newly discovered evidence. The motion was supported by numerous affidavits. Summarily stated, the grounds set forth in that motion were that, within a few days after the date of the rescript from this court, a history of the case, published in the newspapers, was seen by Dr. William Liebman, a physician in Boston, who communicated to attorneys for the defendant the fact that at the Massachusetts Charitable Eye and Ear Infirmary, on July 8, 1912, within forty-

eight hours after the accident to the plaintiff, he took three different X-ray pictures, showing the clear outlines of a bullet from a cartridge in the plaintiff's eye, that he exhibited the plates to the plaintiff and called his attention to the fact that there was a bullet in his eye, and had conversation with him respecting a bullet on a street car track. Photographic prints were annexed to the affidavit of Dr. Liebman. To the eye of the ordinary person these appear unmistakably to represent a bullet; and in affidavits of firearm experts the object shown thereby was said to be a bullet. The defendant ought not to have been held liable if the object which entered the plaintiff's eye was a bullet. Evidence of this nature, if believed, would have completely exonerated the defendant. The motion was heard on March 4 and April 8, 1916. On November 14, 1916, the motion was overruled with a reference to a paper filed therewith called a "Memorandum of Decision." Thereafter, on November 18, the defendant applied for a rehearing, which was granted and a rehearing was had on January 20 and on March 17, 1917. It is in connection with this rehearing that these exceptions were taken. On August 16, 1917, the motion was denied, with a further accompanying paper called "Memorandum of Decision."

The exceptions of the defendant, upon which reliance now is placed, relate to the refusal by the judge to make certain findings of fact, to his denials of certain requests for rulings of law, and to "the overruling of its said motion . . . and the action of the court as set out in its said claim of exceptions."

The judge was under no obligation to make any findings of fact. He could not be required to do so by requests presented by the parties or either of them. *Lowell v. Bickford*, 201 Mass. 543, 545. *Jaquith v. Morrill*, 204 Mass. 181, 188. *Wells v. Wells*, 209 Mass. 282, 291. *O'Neill v. County of Worcester*, 210 Mass. 374, 377. *Given v. Johnson*, 213 Mass. 251, 253. *Clarke v. Second National Bank*, 177 Mass. 257, 264. *Puffer Manuf. Co. v. Yeager*, 230 Mass. 557, 563. Even in equity, where the practice in this particular is much more liberal than at law, it has been said that such a practice should not be encouraged, for its inevitable result would be to put on trial the magistrate instead of the case. *Warfield v. Adams*, 215 Mass. 506, 520. This is an action at law. The only obligation of a judge in an action at law is to pass upon pertinent requests

for rulings of law seasonably presented and to decide the case. *John Hetherington & Sons, Ltd. v. William Firth Co.* 210 Mass. 8, 17-19. This principle applies as well to motions for a new trial as to other steps in the adjudication of the case, except that now, under St. 1911, c. 501, when a new trial is granted a judge is required to state his reasons in writing. That statute, however, has no application in instances where such a motion is denied. Findings of fact not infrequently are made and the reasons of a decision stated for the information of parties and counsel, but that is merely a practice of convenience. *Boyd, petitioner*, 199 Mass. 262. So far as findings of fact were made in the case at bar, they will be considered in connection with other exceptions.

The papers filed by the judge in the case at bar, each called "Memorandum of Decision," (as to the use of this phrase see *Commonwealth v. O'Neil*, 233 Mass. 535,) do not ordinarily constitute any part of the record, *Boyd, petitioner*, 199 Mass. 262, *Abbott v. Walker*, 204 Mass. 71, although under St. 1911, c. 501, when a motion for a new trial is granted the statement of reasons of decision is made a part of the record. *Edwards v. Willey*, 218 Mass. 363, 365. Both these papers, however, expressly are made a part of the bill of exceptions and therefore are before us for consideration in any material aspect. *Cressey v. Cressey*, 213 Mass. 191, 192.

The controlling principles of law respecting the granting of motions for new trials on the ground of newly discovered evidence are settled. The judge must find that the evidence is material. In this connection "material" means something more than simply competent and admissible; it must be weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration. Ordinarily the evidence must be something different in nature from that which is merely cumulative, although in this connection "cumulative" is given a somewhat restricted significance and the principle is not absolutely rigid. It sometimes has been said that the newly discovered evidence must be "of such a character that it would, so far as can be foreseen, have formed a determining factor in the result," *Hip Foong Hong v. H. Neotia & Co.* [1918] A. C. 888, 894, or "such as is presumably to be believed, and if believed would be conclusive," *Brown v. Dean*, [1910] A. C. 373, 374, see, however,

page 376. Those statements are too strong to express our practice. It is enough if the newly discovered evidence appears to be so grave, material and relevant as to afford a probability that it would be a real factor with the jury in reaching a decision. The motion ought not to be granted except upon proof of important evidence of such a nature as presumably would have genuine effect. It is not essential in all cases that the judge must be convinced that the verdict at a new trial would inevitably be changed by the new evidence. It must also appear commonly that there has been no want of diligence by the party making the motion in failing to have found the evidence before trial, and no laches in presenting it to the judge after its discovery. When a case has been fairly and fully tried upon correct principles of law, and a verdict has been rendered, it is in the interest of the Commonwealth that there should be an end of the litigation. It is easy for a defeated party to believe that the result would be affected by smaller matters than appear of significance to an impartial mind. See *Zeilin v. Zeilin*, 202 Mass. 205, and *Renwick v. Macomber*, 233 Mass. 530. These statements of the extent of the power and of limitations upon the right to grant new trials, illuminating, guiding and controlling as they are in most cases, are not necessarily decisive in every case. They must yield to the fundamental test, in aid of which most rules have been formulated, that such motions ought not to be granted unless on a survey of the whole case it appears to the judicial conscience and judgment that otherwise a miscarriage of justice will result. On the other hand, it is not imperative that a new trial be granted even though the evidence is newly discovered and, if presented to a jury, would justify a different verdict. A new trial may be granted whenever the judge is "satisfied that, by reason of some accident, mistake, or misfortune in the conduct of the trial, a new trial is necessary to prevent a failure of justice." *Greene v. Farlow*, 138 Mass. 146.

It commonly and rightly is said that such a motion is addressed to the discretion of the court. By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound

judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just. It may be assumed that conduct manifesting abuse of judicial discretion will be reviewed and some relief afforded. *Hayward v. Langmaid*, 181 Mass. 426, 429. *Manzigian v. Boyajian*, 183 Mass. 125. *Berggren v. Mutual Life Ins. Co. of New York*, 231 Mass. 173, and decisions there reviewed. *Sherman v. Collingwood*, 221 Mass. 8, 14. *Commonwealth v. Borasky*, 214 Mass. 313, 322, and cases collected. *Simmons v. Fish*, 210 Mass. 563, 572. *Keet v. Mason*, 167 Mass. 154. *Powers v. Bergman*, 210 Mass. 346. *Davis v. Custer*, 230 Mass. 603. *Freeman v. Boston*, 178 Mass. 403. *Ellis v. Ginsburg*, 163 Mass. 143. *Harrington v. Boston Elevated Railway*, 229 Mass. 421, 432, 434.

There is no ground for a contention that the judge in the case at bar misdirected himself as to the general rule of law by which he was to be guided in considering the motion. He stated the correct principles with substantial accuracy in the second paragraph of his first decision. In granting numerous requests presented by the defendant, he went quite as far as was justifiable and committed no error injurious to the defendant.

The chief emphasis of the argument for the defendant is that the record in its entirety shows an abuse of judicial discretion in the treatment of the whole matter of the motion for a new trial and that this is manifest by unreasoning prejudice, inconsistencies of findings, and failure to treat the motion in the light of the evidence with impartiality and intelligence. These are arguments serious in character. They demand serious consideration.

The judge heard the parties at whatever length they desired. After rendering his first decision, he reopened the matter and listened to a good deal of oral evidence in addition to numerous affidavits. Adequate time was taken for deliberation after the conclusion of each hearing before a decision was rendered. There is nothing in the record to indicate a hasty prejudgment or any want of patience in considering the matter.

The final finding of the judge, which refers to his earlier decision, is that "the X-ray plates were not sufficiently verified to

make them worthy of credence, . . . that the proposed new evidence is not newly discovered; that it is cumulative; that it is not in point of character, weight or credibility sufficient in the exercise of judicial discretion, to justify a disturbance of the verdict. . . . Moreover, viewing the case in its entirety, I am of opinion that if the alleged newly discovered evidence could be deemed to be newly discovered and to not be cumulative, the motion should be denied as matter of discretion." It hardly needs be said that, if the record showed that the last sentence were added in any other than a sound judicial spirit, it would be disregarded.

These are separate conclusions. They do not depend upon each other for support. They are treated by the judge each as a distinct and disconnected reason for refusing to grant the motion.

The finding that the evidence was not newly discovered in the bald way in which it is stated seems without support in view of the express finding that the attorneys for the defendant stated the truth as to their information concerning the X-ray plates. That being found as a fact, there is nothing in the record anywhere to indicate that the defendant through any agent or officer had knowledge of the X-ray plates or record at any time earlier than a few days before the motion for a new trial was filed.

The defendant's fourth request for ruling was that on all the evidence, "the inference is not warranted that the defendant has been guilty of such negligence as to disentitle it to rely upon the alleged newly discovered evidence." The judge construed that request "to be a question of both, and request for ruling refused." We construe this as meaning that he could not find both the facts therein stated, namely, that the evidence was newly discovered and that there was no negligence of the defendant in failing to ascertain about it earlier and therefore it was refused.

This refusal to rule and the finding that the evidence was not newly discovered should be considered in connection with the further finding that the defendant failed in the exercise of due diligence to discover the evidence on which it now relies. At the first trial a Dr. McKenzie, called by the plaintiff as a witness, testified, "There evidently was an X-ray taken of this on July 8th. The X-ray really doesn't mean much. . . ." At the second trial the same witness again called by the plaintiff testified, "An X-ray

record shows that there was a foreign body in his eye of some sort." The record does not compel a finding that these statements were made fraudulently or with a purpose to mislead, even when taken in conjunction with the destruction of the object, removed from the plaintiff's eye, in a chemical analysis and the refusal to permit the defendant to photograph it, which action was taken by others representing the plaintiff. The manner in which these references were made did not emphasize their importance but there was thereby brought to the attention of the defendant the fact that an X-ray had been taken, information which confessedly was not followed up by insistence upon discovery of the plates. This finding is not without support in evidence. It cannot be said as matter of law that the fact that the subject of X-ray, being brought out even in this way, ought not at that time to have called for further investigation by the defendant.

The judge was in error in ruling that the evidence of the X-ray plates and the hospital record concerning them was cumulative and not substantial evidence of a different character from any introduced at the trial. No X-ray plates whatever had been shown at the trial. No record concerning them was then produced. The infirmary record here disclosed purporting to have been made on July 8, 1912, only two days after the injury to the plaintiff, contained the words descriptive of the object disclosed by the X-ray plate, "Bullet localized." The plates themselves showed an object which to the untrained eye strongly resembles a bullet. These were pieces of evidence closely contemporaneous with the occurrence of the injury to the plaintiff. They constituted a distinct species of evidence differing in kind from any given at the trial. Of course there was evidence at the trial tending to show that the object in the plaintiff's eye was a bullet. The test, whether evidence is cumulative, is not whether it tends to establish the same fact but whether it is different in kind. "Cumulative evidence is additional evidence of the same kind to the same point." *Parker v. Hardy*, 24 Pick. 246, 248. *Watts v. Howard*, 7 Met. 478. *Chatfield v. Lathrop*, 6 Pick. 417. *Whitcomb v. Whitcomb*, 217 Mass. 558, 565. *Herrick v. Waitt*, 224 Mass. 415, 418. *Gardner v. Gardner*, 2 Gray, 434, 443. The newly discovered evidence here described with reference to the issues tried to the jury in principle cannot be distinguished from a receipt as evidence of payment

held to have been not cumulative in *Bacon v. Williams*, 11 Gray, 222.

A finding of fact was made in the first decision, which was not mollified in the second, to the effect that "artifice was practised in the producing of the plates." The word "artifice" in this connection implies craftiness and deceit. It imports some element of moral obliquity. A witness testified at an early hearing to the effect that "a person experienced in X-ray work could easily invent an original plate to represent what he chose to have it represent, and could by painting or touching up an existing plate and then photographing it produce a negative of such a character that the fact that it had been painted or touched up could not be detected," although the witness also said that "he did not see any reason in this particular case for basing any suspicion of the plates or pictures therefrom." No question was raised as to the admissibility of this evidence, but in the face of it, the defendant's counsel inquired whether any argument was to be made to the effect that the plates or photographs in question had been invented, tampered with, or that there had been any dishonesty on the part of Dr. Liebman or his assistant, for, if so, he desired to call him as a witness and to produce the plates, which had not been done up to that time although at a subsequent hearing after the first decision he was called and the plates produced. Thereupon the judge asked the plaintiff's counsel whether he intended to make any such contention. Upon receiving a reply in the negative, the judge said that he did not see any necessity for calling Dr. Liebman as a witness or for producing the plates. In connection with this incident, there appears in the record no evidence, either in the testimony of the two doctors or elsewhere, to support a finding of "artifice . . . in the producing of the plates."

We infer from the record that there may have been some misunderstanding on the part of the judge between what was disclosed by the X-ray plates and the photographs of those plates, which were the results of mechanical processes, on the one hand, and the calculations and charts made from and based upon those plates, which were the result of processes of the human mind, on the other hand. It is possible that there is in the record indication of other inconsistencies in the findings of the judge. It is assumed in favor of the defendant that there are for the purposes of this

decision. It is not necessary to review further his findings or the evidence in this particular.

The ultimate determination to be reached by the judge rested mainly on the view which he took of the testimony of Dr. Liebman, several affidavits from whom were filed and who also testified orally at one of the hearings. That was to be viewed in every aspect of its credibility, not only as to honesty of purpose of the witness but also as to his retentiveness of memory, scientific learning, skill in respect of X-rays, accuracy of record keeping, and all the other elements which affect trustworthiness of testimony. It is manifest that the judge did not place reliance upon that testimony and was not satisfied that the X-ray plates represented an object in the head of the plaintiff. One of his findings of fact, in response to the defendant's request 23 F, was to this express point. The plates in question were taken soon after the practice of taking X-rays was inaugurated at the infirmary. Comparatively inexperienced persons were then in charge of it and the department had not become thoroughly organized. There was testimony from Dr. Liebman to the effect that at that time "It was not an unusual thing to have plates lost, mislaid; brought downstairs out of the department by some doctor or other and not brought back, and he supposed that sometimes they would get out of the jackets and sometimes they would stay in the jackets. He didn't know of its happening, but it could happen with the system or that general method or lack of method in vogue, of course it was more than possible that A's plate could get into B's jacket and *vice versa*: there was not anybody having complete systematic control then." Confessedly the witness had made some changes in the records and of markings upon the jackets or envelopes of the plates and mistakes of calculation respecting the location of the object in the eye. The judge had presided over the trial and heard the object, taken from the plaintiff's eye, described by the surgeon who removed it and by others who saw it.

Without reviewing the record in further detail, we are unable to say that the distrust which was felt by the judge concerning the identification of the plate as representing the object in the head of the plaintiff was irrational. The credit to be given to a witness who testifies orally before a magistrate, even in equity where it is the duty of this court upon a full report of evidence to reach an

independent decision, is ordinarily for the judge who sees him and observes his manner of giving evidence, and his decision will not be revised unless found to be plainly wrong. In an action at law the question for us is whether there was any foundation whatever in law for the conclusion reached. *Wade v. Smith*, 213 Mass. 34. Nothing is more clearly a pure question of fact than the degree of weight that shall be given to the testimony of a witness. There are many reasons which may lead the tribunal charged with the decision of facts to discredit the testimony of a witness, and such a decision cannot be revised. *Commonwealth v. Russ*, 232 Mass. 58, 69, 70. Scarcely anything can be conceived of as more simple and devoid of complexity in law than settling the confidence to be reposed in a witness. Difficult as it may be in some instances, it involves little more than the exercise of experienced common sense. The degree of credibility to be attached to the statements of anybody cannot be ruled as matter of law. *McDonough v. Metropolitan Life Ins. Co.* 228 Mass. 450, 452, 453.

The question is not whether we should take a different view of the evidence or should have made an opposite decision from that made by the trial judge. To sustain these exceptions it is necessary to decide that no conscientious judge, acting intelligently, could honestly have taken the view expressed by him. *Ogden v. Aspinwall*, 220 Mass. 100, 105. We are not prepared to decide that.

The decision as a fact that the X-ray plates were not sufficiently identified and that the testimony of Dr. Liebman was not of sufficient weight to lead his mind to the conclusion that it would have any effect upon a verdict, was decisive of the issue raised by the motion for a new trial. It was not necessary to consider any other or further ground. That ended the matter. The judge treats this ground as independent of the other grounds to which reference is made in his statement of reasons. He says in substance that even if wrong in all else that he has found or ruled, his decision would rest upon this ground alone. This ground stands by itself. It does not appear to be affected or vitiated in any degree by the errors which have been pointed out in his other rulings or findings. There was nothing wrong in so framing his decision that it might rest on several different grounds. It was far from being an abuse of judicial discretion.

There was no error of law in the withdrawal from and later

restoration to the files of the findings of fact made by the judge. *Waucantuck Mills v. Magee Carpet Co.* 225 Mass. 31.

The whole record has been carefully examined. All the arguments put forward in the elaborate brief and in the full argument in behalf of the defendant have been considered. Our conclusion is that there is no ground in law for setting aside the decision of the judge respecting the motion. It fails to reveal an abuse of judicial discretion or any error of law touching the one separate, independent and sufficient ground upon which the decision of the judge is said by him to rest. It follows that the entry must be

Exceptions overruled.

ZOTIQUE BEAUDRY vs. HAMEL SHOE MACHINERY COMPANY.

Essex. March 9, 10, 1920. — April 6, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Contract, Construction, Performance and breach. Pleading, Civil, Declaration. Practice, Civil, Amendment.

A contract in writing between an inventor and a manufacturing corporation provided that the corporation should have the exclusive license to make and sell machines embodying certain patents and applications for patents of the inventor, that the inventor would convey to the corporation letters patent and applications for such, both domestic and foreign, covered by the license, that the corporation should pay the plaintiff for the machines at specified rates and should forthwith pay him \$5,000 as an advance payment; and further provided, in a paragraph numbered 8, that the inventor agreed "that whenever the . . . company shall have paid him the said total sum of \$45,000, whether as royalties, or as lump payment before said royalties shall have become due, he will convey to the . . . company free and clear of all incumbrances the entire right, title and interest to all the inventions, letters patent, and applications for letters patent, both domestic and foreign covered by the license hereinbefore granted." In an action by the inventor against the corporation for breach of the contract, the inventor alleged that the corporation requested him to assign to it certain letters patent, and that he did so; that such letters patent were all that were issued to the inventor during the term of the agreement and that they covered inventions which were indispensable to the improved form of the patented machine, and that the defendant owed the plaintiff \$40,000. On demurrer to the declaration it was *held*, that the declaration set out no cause of action.

A motion to amend the declaration above described added, as further allegations, that the corporation "gave notice to the plaintiff that it desired to avail itself of the right and option contained in paragraph 8 of said contract to which the plaintiff

had bound himself, to purchase all said letters patent for the sum of \$45,000, and in pursuance of said notice the defendant requested the plaintiff to assign to it certain of said letters patent as hereinafter more particularly set forth, thereby intending that the plaintiff should understand that the defendant had decided to exercise said option to purchase and would pay therefor the balance of the 'lump' sum of \$45,000, and the plaintiff in consequence of said notice and request and understanding that the defendant had elected to exercise said option and would pay said sum of \$45,000, did assign to the defendant the absolute title to said letters patent;" that the plaintiff "has been ready and willing at all times to assign and transfer to the defendant any and all of his remaining inventions, letters patent and applications for letters patent, foreign and domestic, referred to in said contract and not heretofore sold to the defendant, and has notified the defendant to that effect, and that he had made and duly tendered to it an instrument, selling, assigning and transferring to it all inventions, letters patent and applications for letters patent covered by said contract;" and that the patents specifically enumerated in the declaration covered new and improved machines. *Held*, that the motion to amend included new matter which set forth a cause of action, and that the motion should be allowed.

CONTRACT, for breach of a contract in writing relating to the manufacture, sale and lease by the defendant of certain machines invented by the plaintiff. Writ dated February 10, 1919.

The declaration was amended after entry, and the amended declaration is described in the opinion. The defendant demurred. The demurrer was heard by *Wait, J.*, and was sustained. The plaintiff appealed.

Thereafter the plaintiff moved to amend the amended declaration, as described in the opinion. The motion was heard by *Lawton, J.*, and was denied on the grounds described in the opinion.

The rulings sustaining the demurrer and denying the motion to amend the declaration then were reported by the respective judges for determination by this court.

C. F. Perkins, (*C. L. Perkins & P. F. Perkins* with him,) for the plaintiff.

R. Spring, (*G. P. Dike* with him,) for the defendant.

PIERCE, J. This case came before a judge of the Superior Court on demurrer to an amended first count of the declaration. The demurrer was sustained and the judge before taking further action has reported the question raised thereby for the determination of the Supreme Judicial Court.

The action is in contract upon a written agreement under seal, between the plaintiff and the defendant, dated August 13, 1913,

and a copy of the agreement is annexed to the declaration. As a preamble to the agreement it is recited that Beaudry is the owner of certain letters patent and applications for letters patent of the United States for inventions; that "Beaudry desires to obtain a market for machines embodying the said inventions or some of them;" that the Hamel company "desires to obtain the right to make, use and sell or lease machines embodying said inventions or some of them, and may desire to purchase said letters patent, and applications for letters patent, together with any patent or patents which may be issued upon said applications, and any foreign patents for said inventions, and to acquire any improvements upon the subject matter of said patents, or applications for patents which may be hereafter made by the said Beaudry." The agreement then continues: "Now therefore for and in consideration of the sum of one dollar and other good and valuable considerations each to the other paid, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements herein contained, it is agreed as follows:"

1. The said Beaudry grants to the Hamel company, subject to the conditions hereinafter contained, the exclusive license for the term of the agreement, to make, use and sell machines embodying the inventions shown and described in certain enumerated letters patent, or applications for letters patent or any substantial part thereof, or any patent or patents on any pending applications, or any letters patent which may be issued on any improvements "made, owned or controlled" by said Beaudry.

2. He agrees to disclose to the Hamel company hereinafter called the defendant any improvements on the machines covered by the letters patent and applications for letters patent.

3. To make application for letters patent on such improvements as the defendant requests at the expense of the defendant, and to execute licenses therefor to the defendant of the same tenor as the licenses granted.

4. He agrees that the defendant shall have the right to call the machines by the name of Beaudry and employ the name Beaudry in connection with the business of making and selling or leasing machines under this lease.

5. He agrees not to engage in the business of burnishing or edge setting for five years.

6. He agrees "to . . . execute any and all patents" and do any and all acts which may be necessary or useful in more fully vesting in the defendant "the rights herein granted, but without expense to himself."

7. He agrees "that whenever the Hamel Company shall have paid him the said total sum of forty-five thousand dollars, whether as royalties, or as lump payment before said royalties shall have become due, he will convey to the Hamel Company free and clear of all incumbrances the entire right, title and interest to all the inventions, letters patent, and applications for letters patent, both domestic and foreign covered by the license hereinbefore granted."

The defendant agrees:

1. To use its best efforts to create a market and a demand for machines embodying the inventions covered by this license agreement.

2. It agrees to employ the plaintiff for one year at \$35 per week, it to have the privilege of continuing the employment from year to year for five years from the date of the agreement.

3. It agrees to pay the plaintiff for such machines as are sold or leased at specified rates.

4. It agrees to keep accurate accounts and to furnish to the plaintiff a statement of the number of machines sold or leased, at stated times, with a check for the payment of royalties due the plaintiff as shown by the statement.

The contract further provides: "It is mutually understood and agreed that if the Hamel Company shall not have paid the said Beaudry the sum of forty-five thousand dollars as hereinbefore provided within five years from the date hereof, the said Beaudry shall have the right to terminate this agreement by giving the said Hamel Company thirty days notice in writing, and further that if at any time the Hamel Company desires to cancel this agreement it may do so by giving the said Beaudry thirty days notice in writing, but in such case the said Beaudry shall not be required to repay any portion of the sum of Five Thousand Dollars paid to him as an advance on royalties as provided in paragraph 7 hereof." It also agrees that it will upon the execution of the agreement pay to the plaintiff the sum of \$5,000 as an advance payment on account of royalties to be paid under the terms of the agreement.

As amended the first count of the declaration contained the following allegations: "That the defendant pursuant to the terms of said agreement, at the time of the execution of the same, advanced to the plaintiff the sum of five thousand (\$5000) dollars on account of royalties thereafter to accrue; that the plaintiff agreed that upon the payment to him by the defendant as royalties or purchase price of the sum of forty thousand (\$40,000) dollars in addition to said five thousand (\$5000) dollars within the term of said agreement, to wit: five years from the date thereof, he would assign and convey to the defendant company free and clear of all incumbrances the entire right, title and interest to all the inventions, letters patent, and applications for letters patent, both domestic and foreign, covered by said license and agreement. And the plaintiff further says that the defendant pursuant to its right and privilege under said agreement to acquire the title to said letters patent, applications for letters patent and inventions for the sum of forty-five thousand (\$45,000) dollars, requested the plaintiff to assign to the defendant, and the plaintiff accordingly did so assign the following letters patent as they were issued to him, to wit: [five letters patent then enumerated]; that said last named five letters patent were all the United States letters patent that were issued to the plaintiff during the term of said agreement; that they covered inventions which were indispensable to the improved form of the said patented machine; that the defendant after the execution of said agreement by its executive and duly authorized officers, notified the plaintiff and declared that the defendant would avail itself of its right and privilege to purchase said letters patent and inventions, whereupon the plaintiff relied upon the defendant to take the title to the letters patent and inventions remaining in his hands and to pay to him the said additional forty thousand (\$40,000) dollars as the purchase price specified."

The demurrer assigns as causes that the declaration sets out no cause of action against the defendant substantially in accordance with R. L. c. 173, and that the contract nowhere provides that upon the conveyance or assignment of the patents enumerated therein by the plaintiff to the defendant the latter will pay the former \$40,000.

The plaintiff's position is that paragraph "8" of the con-

tract, which reads, "The said Beaudry agrees that whenever the Hamel Company shall have paid him the said total sum of forty-five thousand dollars, whether as royalties, or as lump payment before said royalties shall have become due, he will convey to the Hamel Company free and clear of all incumbrances the entire right, title and interest to all the inventions, letters patent, and applications for letters patent, both domestic and foreign covered by the license hereinbefore granted," is an irrevocable offer of the plaintiff for the term of five years to sell and convey the letters patent to the defendant for the sum of \$45,000; that the defendant assumed no obligation in the contract alone to buy the patents; that he had simply an option to purchase them at the agreed price at any time within five years; that its request to the plaintiff to assign to it the five letters patent enumerated in the declaration, and the assignment thereof as requested, constituted an election by the defendant to exercise its option to purchase the letters patent, worked a transformation of the option contract into a bilateral contract on the terms of the agreement of the plaintiff, and were such a substantial performance of that agreement as rendered the defendant liable for the stipulated price of \$45,000 less the payment of \$5,000 made the plaintiff under the contract.

We are unable to agree with the plaintiff's contention. It is true the defendant was given an irrevocable license to purchase the letters patent enumerated in the agreement, which it might exercise at any time within five years. It is true it did not bind itself to purchase the letters patent. It is equally true that the defendant did not make a "lump payment" of \$40,000 or of any sum, without which the option contract could not be turned into a binding promise to sell and convey the letters patent. It is not contended that the plaintiff has ever conveyed to the defendant the letters patent and applications for letters patent set out in the agreement, nor is it alleged that the plaintiff was requested so to do; the allegation is that the plaintiff at the request of the defendant assigned to the defendant five letters patent enumerated in the declaration, which issued after the execution of the agreement, and it is not alleged that these letters patent were issued subsequently on application for letters patent pending when the agreement was executed. It is plain the declaration does not

set out any breach of the written agreement by the defendant. It follows that the demurrer was sustained rightly.

After the order sustaining the demurrer had been entered, the plaintiff filed a motion to amend his declaration by adding thereto four additional counts, numbered from one to four inclusive, respectively, and by renumbering the counts of the original declaration five and six respectively. The trial judge denied the motion, not in the exercise of his general discretion, but on the specific grounds that (1) "In this proposed amendment to the declaration there is no material matter pleaded which has not been adequately pleaded in the first and second count of the original declaration," and (2) "If it could be ruled that the amended declaration alleges an express oral promise by the defendant to pay any sum of money the plaintiff's answer to the defendant's interrogatories 10 and 11 deny any such promise," and reported the correctness of the order denying the plaintiff's motion to amend to the Supreme Judicial Court for its determination.

We are of opinion that count three of the proposed amendments did add new and material facts to count one of the original amendment, in the following particulars: Count one of the original declaration alleged that "the defendant . . . requested the plaintiff to assign . . . and the plaintiff . . . did so assign" certain enumerated patents; the proposed amendment alleges in substance that "the defendant by its duly authorized officers, gave notice to the plaintiff that it desired to avail itself of the right and option contained in paragraph 8 of said contract . . . to purchase all said letters patent for the sum of forty-five thousand (\$45,000) dollars, and . . . requested the plaintiff to assign to it certain of said letters patent . . . and the plaintiff in consequence of said notice and request and understanding that the defendant had elected to exercise said option and would pay said sum of forty-five thousand (\$45,000) dollars, did assign to the defendant the absolute title to said letters patent." It also alleged in addition to count one that he, the plaintiff, "has been ready and willing at all times to assign and transfer to the defendant any and all of his remaining inventions, . . . not heretofore sold to the defendant, and has notified the defendant to that effect, and that he had made and duly tendered to it an instrument, selling, assigning and transferring to it all inventions, letters patent and applications

for letters patent covered by said contract." It also alleged in addition, in substance, that the letters patent enumerated in the declaration in count one covered new and improved machines. We are of opinion that count three should have been allowed in amendment of count one, and that the amended count states a cause of action which is a breach of the written agreement.

We are also of opinion that count one of the amended declaration states a cause of action which depends not upon the written contract but upon an implied promise of the defendant to pay to the plaintiff the reasonable value of the letters patent sold, assigned and transferred to it by the plaintiff at its request.

Counts two and four add no material facts to counts one and two of the original declaration, and the motion was denied rightly as to each of them.

It follows that the demurrer to count one of the original declaration should be sustained; that the motion to amend count one by adding count three of the amended declaration should be allowed; that the motion to add count one of the amended declaration should be allowed; and that the motion to add counts two and four of the amended declaration should be denied.

So ordered.

DANIEL P. FAHY vs. DIRECTOR GENERAL OF RAILROADS.

Middlesex. March 3, 1920. — April 10, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Negligence, Railroad, Contributory, Imputed. Railroad, Grade crossing. Proximate Cause. Practice, Civil, Requests for rulings.

A guest in a motor car, approaching a grade crossing of a railroad with a highway, was told to "listen for a bell or whistle," and did so, but heard neither. The view along the track was obstructed until the motor car was within twenty-seven feet from the track, when the driver saw a railroad train approaching, which was about one hundred and twenty feet away. The guest jumped and was injured. The driver of the motor car proceeded at an increased speed and passed the crossing in safety. In an action by the guest to recover for his injuries against the director general of railroads, who was operating the railroad company, the jury found specially that the signals required by St. 1906, c. 463, Part II, §§ 147, 148, were not given, and it was held, that there was evidence

warranting a finding that omission to give the signals was negligence of the defendant which contributed to the injury to the plaintiff.

At the trial of the action above described, there was evidence tending to show that the plaintiff's host was reckless in driving the motor car in front of the train as he did. The plaintiff testified that he was looking and listening for an approaching train and relied on himself to learn of its approach. The defendant asked for and the judge refused to make rulings in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff. *Held*, that the rulings properly were refused, because it could not be said as a matter of law that the plaintiff entrusted himself wholly to the care of his host.

A guest in a motor car which is approaching a grade crossing of a railroad with a highway properly may rely on his host to drive the vehicle while he himself uses his senses to ascertain whether a train is approaching; and if, when a train, whose approach has not before been ascertained because the view of the crossing was obstructed and because the signals of its approach required by statute were not given, suddenly is seen one hundred and twenty feet away, the host carelessly drives forward at an increased speed and avoids a collision, but the guest, fearing a collision, jumps from the motor car and is injured, it cannot be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence.

It not being denied, in the action above described, that the plaintiff was a guest of the driver of the motor car, a request for a ruling that he and the driver were engaged in a joint enterprise and therefore that he was bound by the driver's neglect, properly was refused.

TORT for personal injuries caused when the plaintiff jumped from a motor car, in which he was riding as a guest of one Frank L. McKean, who was driving, when it approached a grade crossing of a highway with the railroad operated by the defendant, upon which a train was alleged to have been approaching without sound of whistle or bell. Writ dated August 27, 1918.

In the Superior Court, the action was tried before *Raymond, J.* Material evidence is described in the opinion.

At the close of the evidence, the defendant moved that a verdict be ordered in his favor. The motion was denied. The defendant also asked for the following rulings:

"1. If the jury find that Frank L. McKean was negligent in operating the automobile, and that this negligence contributed to the accident and that the plaintiff had trusted solely to the care and caution of said McKean, he cannot recover.

"2. If the jury find that the plaintiff and Frank L. McKean were engaged in a common enterprise and that said McKean was guilty of negligence, the plaintiff cannot recover.

"3. If the jury find that the plaintiff voluntarily surrendered all care of his person to Frank L. McKean and absolutely relied upon the caution of said McKean, he cannot recover.

"4. If the jury find that the plaintiff's right of recovery depends upon the due care of Frank L. McKean, they are instructed that there is no presumption that said McKean was in the exercise of due care, but the burden is upon the plaintiff to establish that fact by a fair preponderance of the evidence.

"5. If the jury find that the engine of the defendant's train was seen by the driver of the automobile at a time when there was still a reasonable opportunity to stop the automobile before it would reach the railroad crossing, the plaintiff cannot recover.

"6. If the jury find that both the plaintiff and the driver of the automobile saw the engine of the defendant's train approaching the crossing at a time when his automobile was at a sufficient distance from the crossing and was moving at a sufficiently slow rate of speed that they had a reasonable opportunity to stop said automobile before reaching said crossing, the plaintiff cannot recover.

"7. If the jury find that the driver of the automobile and the plaintiff both saw the defendant's engine at such a time and under such circumstances as would have caused and permitted a reasonably careful man operating said automobile not to have proceeded upon the crossing, the plaintiff cannot recover.

"8. If the jury find that the driver of the automobile saw the defendant's engine at such a time and under such circumstances as would have caused a reasonably careful man operating said automobile not to have proceeded upon the crossing, any failure on the part of the agents or servants of the defendant to have given the warnings required by statute would not be a contributing cause to the accident and would not be such negligence as would support a verdict for the plaintiff.

"9. If the jury find that the relations and understanding between the plaintiff and McKean were of such a nature that both parties anticipated that the movements of the automobile, after the time the defendant's engine was seen by McKean, was to depend solely upon the judgment and caution of said McKean and that they further find that negligence of McKean contributed to the accident, the plaintiff cannot recover.

"10. If the jury find that the relations and understanding be-

tween the plaintiff and McKean were of such a nature that both parties anticipated that the movements of the automobile, after the time that the defendant's engine was seen by McKean, was to depend solely upon the judgment and caution of said McKean and that at the time said engine was so seen, the automobile was at such a distance from the crossing and was moving at such a speed that McKean had a reasonable opportunity to stop the automobile before reaching the crossing, the plaintiff cannot recover.

"11. If the jury find that the relations and understanding between the plaintiff and McKean were of such a nature that both parties anticipated that the movements of the automobile, after the time that the defendant's engine was seen by McKean, was to depend solely upon the judgment and caution of said McKean, the plaintiff cannot recover."

The rulings were refused. There was a verdict for the plaintiff in the sum of \$3,950; and the defendant alleged exceptions.

J. M. O'Donoghue, for the defendant.

J. C. Reilly, for the plaintiff.

CARROLL, J. The plaintiff was injured by jumping from the rear seat of an automobile, in which he was riding as the guest of the owner and driver, Frank L. McKean, at a double track grade crossing in the town of Dunstable. There was evidence that about five hundred feet from the crossing the automobile was stopped and as it started McKean told the plaintiff and two companions who were with him that they were approaching the crossing and to "listen for a bell or whistle." The road was down grade to a point about fifteen feet from the crossing, then up grade to the crossing. From a distance of two hundred feet to within about eight feet of the nearest rail, or twenty-seven feet from the farthest rail, as stated by the witnesses, there were bushes which obscured the view of an approaching train. When the automobile going at the rate of fifteen miles an hour was within twenty-seven feet of the farthest track, upon which the train was approaching, both McKean and the plaintiff saw the train, — then about one hundred and twenty feet away. McKean started the automobile forward and the plaintiff jumped to the ground, striking his foot against the planking. The automobile safely passed the crossing. The plaintiff testified that he was looking and

listening for a bell or whistle and heard none, and neither saw nor heard anything indicating the approach of a train until he was within twenty-seven feet of the track. The jury found that the statutory signals were not given.

1. The defendant contends that the omission to give the statutory signals was not a contributing cause to the plaintiff's injury. If the jury believed the testimony of the plaintiff that the view of the train was concealed by the bushes and while listening he heard no signal by bell or whistle, they could find that by reason of the defendant's neglect he was placed in a position of great danger but a short distance from a rapidly moving train, and that this neglect contributed to his injury. *Doyle v. Boston & Albany Railroad*, 145 Mass. 386, 387. *Kelsall v. New York, New Haven, & Hartford Railroad*, 196 Mass. 554, 555. *Engleman v. Boston & Maine Railroad*, 210 Mass. 179, 181. *Griffin v. Hustis*, 234 Mass. 95.

2. There was evidence from which the jury could find that the plaintiff did not surrender all care for himself to the caution of the driver McKean. He testified that he was looking and listening and relied on himself to learn of the approach of the train; and if it could be said that McKean was reckless and lacking in due care in not bringing the automobile to a stop at once on seeing the train, instead of driving forward at an increased speed and barely escaping a collision, his lack of care is not to be imputed to the plaintiff so as to charge him with McKean's neglect. Even if McKean had a reasonable opportunity when he first saw the train to stop the automobile before reaching the crossing, the plaintiff might still be found to have been careful if he trusted to himself for his safety. The jury were told if the plaintiff surrendered his care and safety to McKean and McKean was careless, the plaintiff could not recover. There was no error, therefore, in refusing the defendant's requests based on the assumption that the plaintiff voluntarily surrendered all care of his person to McKean.

The plaintiff could properly rely on McKean to drive the automobile while he himself used his own senses to ascertain the approach of the train. There was no error in the refusal to give the defendant's request bearing on this part of the case. *Griffin v. Hustis, supra*.

3. The defendant asked that a verdict be directed in his favor

because the plaintiff was not in the exercise of due care. It was plainly a question for the jury whether the plaintiff's conduct in remaining in the automobile until he saw the train was that of a prudent man. They might say that up to this time he did all that could be expected of a person of ordinary care and caution. If, as soon as the plaintiff saw the danger, without time for reflection, realizing that the train was within a few feet of him and that a collision was almost inevitable he jumped from the automobile, thinking it best for his safety, and if the jury found that such conduct was reasonable in view of all the circumstances, they could decide he was using proper care and it could not be ruled as matter of law that he was careless. *Griffin v. Hustis, supra.*

It was not denied that the plaintiff was a guest of McKean. He was not, therefore, engaged in a joint enterprise with the owner of the automobile, and was not bound by his neglect. *Peabody v. Haverhill, Georgetown & Danvers Street Railway*, 200 Mass. 277, 279. We find no error in the judge's charge taken as a whole.

Exceptions overruled.

VALVOLINE OIL COMPANY vs. INHABITANTS OF WINTHROP.

Suffolk. March 3, 1920. — April 10, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Way, Public: defect. Tree. Municipal Corporations, Officers and agents.

Under the provisions of St. 1915, c. 145, § 5, no one excepting a tree warden or his deputy may trim, cut or remove a tree within the limits of a highway of a town, even if the tree endangers persons lawfully travelling upon the highway; but, if such a tree is a source of danger to travellers on the highway, it is the duty of the town officials to order the tree warden to trim or to cut down the tree and of the tree warden to carry out the order.

Failure of town officials to order the tree warden to cause the removal of a limb of a public shade tree which for a long time so had overhung the travelled portion of a highway as to be a source of danger and an obstruction to the travelling public, and to give such warning to travellers on the way as would protect them while the tree warden was carrying out the order, will render the town liable for damages resulting from a traveller in a wagon upon the highway running into the limb.

Where, from the trunk of a sound and healthy tree about fifty years of age standing in a sidewalk within the limits of a public way and within six inches from the roadway, a limb, also sound and healthy and three feet six inches in circumference

where it leaves the trunk, protrudes over the roadway seven feet above the surface of the ground, such limb may be found to be a defect in the way within the provisions of St. 1917, c. 344, Part IV, § 24.

TORT under St. 1917, c. 344, Part IV, § 24, for damages caused to the plaintiff's wagon when it struck a limb of a tree permitted by the defendant to protrude over the travelled part of Hermon Street seven feet from the surface of the ground. Writ in the Municipal Court of the City of Boston dated January 7, 1919.

The facts found by the judge who heard the action in the Municipal Court are described in the opinion. He refused to grant rulings, asked for by the defendant, in substance that upon the evidence and the law the plaintiff could not recover, and found for the plaintiff in the sum of \$91.19, an amount agreed upon by the parties as damages, and reported the case to the Appellate Division, who ordered that the finding be vacated and that judgment be entered for the defendant. The plaintiff appealed.

St. 1915, c. 145, §§ 1-5, are as follows:

"Section 1. The powers and duties conferred and imposed upon tree wardens in towns by this act are hereby conferred and imposed upon the officials now or hereafter charged with the care of shade trees within the limits of the highway in cities, by the charters of the said cities, by other legislative enactment, or by the ordinances of the said cities, and upon such officials as the city governments shall designate to have charge of said shade trees where it is within their power to transfer such duties, by ordinance or otherwise.

"Section 2. The tree warden may appoint and remove deputy tree wardens. He and they shall receive such compensation as the town determines or, in default thereof, as the selectmen allow. He shall have the care and control of all public shade trees, shrubs and growths in the town, except those within the limits of a State highway, and except those in public parks or open places under the jurisdiction of the park commissioners, and of those, if so requested in writing by the park commissioners, and shall enforce all the provisions of law for the preservation of such trees, shrubs and growths. He shall expend all money appropriated for the setting out and maintenance of such trees, shrubs and growths, but no trees shall be planted within the limits of a public way without the approval of the tree warden; and in towns until a location therefor

has been obtained from the selectmen or road commissioners, where authority has been vested in said commissioners. Regulations, other than those made by the terms of this act, for the care and preservation of public shade trees made by him, and in towns approved by the selectmen, and posted in two or more public places, imposing fines and forfeitures of not more than twenty dollars in any one case, shall have the force and effect of town by-laws. All trees within or on the limits of a public way shall be public shade trees; and when it appears in any proceeding where the ownership of or rights in the tree are material to the issue, that, from length of time or otherwise, the boundaries of the highway cannot be made certain by the records or by monuments, and that for that reason it is doubtful whether the tree be within or without the limits of the highway, or is public or private property, it shall be taken to be within the limits of the highway and to be public property until the contrary is shown.

"Section 3. Except as provided by section five, public shade trees shall not be cut, trimmed or removed, in whole or in part, by any person other than the tree warden or his deputy, whether such person is or is not the owner of the fee in the land on which such tree is situated, except upon a permit in writing from said tree warden, nor shall they be cut down or removed by the tree warden or his deputy or other person without a public hearing at a suitable time and place, after notice thereof posted in two or more public places in the town or city and upon the tree at least seven days before such hearing, and after authority granted by the tree warden therefor; provided, however, that if the tree warden shall refuse to cut or remove or issue a permit to any such owner to cut or remove any such tree or other growth, the damages, if any, sustained by him shall be determined in towns by the selectmen and in cities by the officer or officers in charge of the public shade trees and shall be paid by the town or city. Any person aggrieved by the action of the selectmen or said officer or officers in charge of the public shade trees as to the trimming, cutting, removal or retention of any such tree, or as to the amount awarded to him for the same may have the damages, if any, which he has sustained, determined by the Superior Court for the county in which the said tree is or was situated, upon a petition filed for the purpose, in the same manner as for the taking of land for ways;

and his damages, so determined, shall be paid by the town or city.

"Section 4. Tree wardens shall not cut down or remove or grant a permit for the cutting down or removal of a public shade tree if, at or before a public hearing as provided in the preceding section, objection in writing is made by one or more persons, unless such cutting or removal or permit to cut or remove is approved by the selectmen or by the mayor.

"Section 5. Tree wardens and their deputies, but no other person, may, without a hearing, trim, cut down or remove trees, under one and one half inches in diameter one foot from the ground, and bushes, standing in highways; and, if ordered by the mayor and aldermen, selectmen, road commissioners or highway surveyor, shall trim or cut down trees and bushes, if the same shall be deemed to obstruct, endanger, hinder, or incommode persons travelling thereon. Nothing contained in this act shall prevent the trimming, cutting or removal of any tree which endangers persons travelling on a highway, nor the removal of any tree, if so ordered by the proper officials, for the purpose of widening the highway, and nothing herein contained shall interfere with gypsy and brown tail moth suppression, as carried on under the direction of the State forester and the United States department of agriculture, except the cutting and removal of trees, shrubs and growths that are one and one half inches or more in diameter one foot from the ground."

S. A. Dearborn, for the plaintiff.

L. C. Guptill, for the defendant.

CROSBY, J. This is an action to recover for damages to the plaintiff's wagon caused by the top of it coming in contact with the limb of a tree growing within the limits of Hermon Street, a public way in Winthrop. The tree is on the sidewalk.

The street at that point is "twenty-six feet wide from curb to curb and forty feet wide from sidewalk to sidewalk." The outer edge of the trunk of the tree is within six inches of the roadway, over which no portion of the trunk extends. The limb in question reaches over the roadway and grows from the trunk about seven feet from the ground. The circumference of the trunk at its base is approximately six feet four inches, and of the limb at the trunk, three feet six inches. The tree is about fifty years old, and at the time of the accident was in sound, healthy condition, including the

limb in question. "It is not claimed by the defendant that the tree . . . was set out by a road commissioner or by public officials," accordingly the decision in *Washburn v. Easton*, 172 Mass. 525, is not applicable. It is agreed that the plaintiff duly notified the defendant of the time, place and cause of the accident.

The laws relating to public shade trees were codified and amended by St. 1915, c. 145. Under that statute all trees within the limits of a highway are public shade trees. § 2.

Except as provided in § 5, public shade trees shall not be trimmed nor removed in whole or in part by any person other than the tree warden or his deputy, except upon a permit in writing from the tree warden, nor shall they be cut down nor removed by the tree warden or his deputy or other person without a public hearing after notices posted as prescribed by the statute and after authority granted by the tree warden therefor. Under § 5, if ordered by the mayor and aldermen, selectmen, road commissioners or highway surveyor, it is the duty of the tree warden to trim or cut down trees and bushes if they shall be deemed to obstruct, endanger, hinder or incommode persons travelling on the highway. It is further provided in § 5, that "Nothing contained in this act shall prevent the trimming, cutting or removal of any tree which endangers persons travelling on a highway. . . ." The part of § 5 last quoted, cannot be construed as authorizing public officials other than tree wardens and their deputies to trim or remove a tree which endangers persons travelling on a highway. The care, maintenance, trimming and removal of shade trees in highways have been the subject of legislative action for several years, and their control is vested in the tree wardens in cities and towns of the Commonwealth, except so far as it is imposed on other officials by the charters of cities, by other legislative enactment, or by the ordinances of cities, or upon such officials as the city government shall designate for that purpose. The result of the legislation on this subject has been to place practically the entire control of such trees in tree wardens, and to leave little, if any, authority in other municipal officers. While the statute (§ 5) provides that nothing in the act shall prevent the trimming, cutting or removal of a tree that endangers persons travelling upon a highway, this language must be construed in connection with other sections of the statute, including § 3. We construe the language in ques-

tion to mean that if a tree endangers persons travelling upon a highway it may be trimmed, cut, or removed by a tree warden or his deputy without notice and hearing, but no other person is empowered so to act.

It follows that the officials named in § 5 may order the tree warden to trim or cut down a tree if they believe it endangers, hinders or incommodes persons travelling on the highway, and it is the duty of the tree warden to carry out the order so given; but the power of the officials named is limited to ordering it to be removed by the tree warden. Under earlier statutes it was held that a surveyor of highways had no authority summarily to cut down a shade tree standing in the highway which was in a defective and dangerous condition, but under Pub. Sts. c. 52, § 10, as amended by St. 1885, c. 123, § 2, he was required to proceed to obtain the consent of the proper municipal authorities, meanwhile taking proper steps to prevent injury to travellers. *Chase v. Lowell*, 149 Mass. 85.

In the case at bar there was evidence that the limb of the tree was an obstruction to travel and that such condition had existed for a long time. Under these circumstances it was the duty of a town official named under § 5 to order the tree trimmed or removed, and in the meantime the town was required to do what was reasonably necessary to protect travellers from injury. *Chase v. Lowell*, 151 Mass. 422. *Wright v. Chelsea*, 207 Mass. 460, 465. *Donohue v. Newburyport*, 211 Mass. 561, 565. Although a tree warden is the only official who may trim or remove shade trees in a highway, that circumstance does not relieve a city or town from the statutory duty of keeping its highways reasonably safe and convenient for travellers. R. L. c. 51, § 1. There was evidence that the plaintiff while in the exercise of due care was travelling in a proper wagon which came in contact with the limb that in the course of time had grown over the travelled part of the way so near the surface of the street that it could be found to be an obstruction to persons travelling thereon. In these circumstances the limb could be found to be a defect which it was the duty of the town to remedy. While many cases have been considered by this court involving injuries to travellers on a highway caused by trees standing within the limits of the way, most of them have arisen because of the decayed condition of such

trees, *Nestor v. Fall River*, 183 Mass. 265, *Wright v. Chelsea, supra*, *Donohue v. Newburyport, supra*, yet we are of opinion that there is no sound distinction between the liability of a city or town for failure to guard against defects caused by trees within the limits of a highway which are old and decayed, and those which, although sound, in course of time cause a defective condition of a highway by growth. Anything in the state or condition of a highway which renders it unsafe for ordinary travel is a defect or want of repair. *Barber v. Roxbury*, 11 Allen, 318. *Maccarty v. Brookline*, 114 Mass. 527. *Chase v. Lowell*, 151 Mass. 422. *Griffin v. Boston*, 182 Mass. 409. *Wright v. Chelsea, supra*. *Donohue v. Newburyport, supra*. *Embler v. Walkill*, 132 N. Y. 222. *Louisville v. Michels*, 114 Ky. 551. See *Shaw v. Ogden*, 214 Mass. 475.

It could have been found that the defendant had such means of knowledge as would charge it with the duty either of ordering the tree trimmed or removed, or of giving warning or otherwise protecting travellers from injury, and that, having failed to do so, it was liable. *O'Neil v. Chelsea*, 208 Mass. 307. If it be assumed that the town officials authorized by § 5 to order the tree trimmed or removed are public officers for whose negligence the defendant is not responsible, that circumstance will not relieve the defendant from liability under the statute which is founded on its failure to keep the street reasonably safe for travel.

It follows that the order of the Appellate Division is reversed, and, in accordance with the agreement of parties, judgment is to be entered for the plaintiff in the sum of \$91.19.

So ordered.

EMMA L. MASON vs. PAUL H. JACOT & another.

Suffolk. December 3, 1919. — May 17, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE, CARROLL,
& JENNEY, JJ.

Agency, Scope of authority. Malicious Prosecution. Evidence. Proximate Cause. Practice, Civil, Order of evidence.

At the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, there was evidence warranting a finding that the

manager and the cashier of the restaurant were authorized by the defendant to do whatever in their opinion was reasonably necessary in the conduct of the business and the preservation of order, even to the extent of calling the aid of the police and of causing appropriate criminal proceedings to be instituted. There also was evidence tending to show that, upon a controversy arising with the plaintiff's husband over payment for food and drink and after the plaintiff's husband and the waiter, who had served him and the plaintiff, had assaulted one another, the manager called a police officer and said to him, "Get after these people [the plaintiff and her husband] and get after them quick. . . . You know me! Get after that couple! You know me! and go the limit. I will stand good for it;" and that the cashier said to the officer, "Take them out of here and give them the limit, push them out of here, take them out of here altogether." There also was evidence that, in the presence of the manager and of the cashier, the police officer said to the plaintiff and her husband, "You people have been drinking," that he took them to a police station and caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless. *Held*, that

(1) A finding was warranted that the officer was constituted the agent of the defendant to arrest the plaintiff and to institute against her whatever criminal proceedings in his opinion could be sustained in any view of the acts of the plaintiff at the restaurant;

(2) The making of a complaint for drunkenness might fairly be regarded as within the terms of the discretion given to the police officer under all the circumstances;

(3) It could not be said that a finding was not warranted that the agents of the defendant, acting within the scope of their authority, without reasonable cause and upon an improper motive, set in motion the train of causation which naturally and proximately resulted in the arrest and accusation of the plaintiff.

The order of the admission of evidence is within the discretion of the trial judge.

TORT, by a guest against the proprietor of a hotel and restaurant, with a declaration in three counts, the third count alleging the malicious prosecution of the plaintiff on a charge of drunkenness. Writ dated April 18, 1916.

In the Superior Court the action was tried before *Fessenden*, J. Material evidence is described in the opinion. The evidence, objected to by the defendants and referred to in the last paragraph of the opinion, was testimony of the plaintiff and of her husband tending to show the conduct of the police officer toward them after they left the restaurant. The evidence first was admitted *de bene* upon an offer by the plaintiff to show that the officer was acting within authority given by the defendants' manager and cashier, and, later, a motion by the defendants to have it stricken out was denied. At the close of the evidence, the defendants moved that a verdict be ordered for them. The motion was denied. The defendants then asked among other rulings for the following: "Upon

all the evidence the defendants did not maliciously prosecute the plaintiff." The judge refused the ruling. The jury found for the plaintiff in the sum of \$3,650 on the third count for malicious prosecution; and the defendants alleged exceptions.

The case was argued at the bar in December, 1919, before *Rugg, C. J., Braley, De Courcy, Crosby, & Pierce, JJ.*, and afterwards was submitted on briefs to all the Justices.

C. J. Martell, for the defendants.

J. J. Mansfield, (J. F. Creed with him,) for the plaintiff.

Rugg, C. J. This is an action of tort. The third count in the declaration, with which alone we are now concerned, alleged the prosecution with malice and without probable cause of a groundless charge for the crime of drunkenness against the plaintiff, which had terminated in her favor. The defendants are the proprietors of a hotel, in conjunction with which they conduct a restaurant. Louis O. Jacot was the general manager of the business and one Josephine Fennelly was cashier and in direct charge of the restaurant. The plaintiff and her husband went to the restaurant on the evening in question. Food and drink were ordered and served. A dispute arose as to the order and the sum to be paid for it, followed according to some of the evidence by an assault upon the waiter by the husband of the plaintiff. There was evidence that afterwards the waiter assaulted the plaintiff and her husband struck him; that the plaintiff's husband repeatedly asked the waiter for a check for the amount of the purchase but failed to get it; that he finally went to the cashier's desk and after making a similar unsuccessful request of Mrs. Fennelly, handed her an envelope with his name and address on it and told her that he could not wait longer to settle the bill but later would come in and pay it; that the plaintiff and her husband then attempted to leave the restaurant but were intercepted by employees of the defendants; that after reaching the street they were met by a police officer (summoned by the waiter and Louis O. Jacot) who asked them to return to the restaurant, which they did accompanied by him; that they went to the cashier's desk and there were charged by the female defendant and by Mrs. Fennelly and Louis O. Jacot with leaving the place without paying for the food; that Louis said to the officer in the presence of the female defendant: "Get after these people and get after them quick. . . . You know me! Get after

that couple! You know me! and go the limit. I will stand good for it;" that Mrs. Fennelly said to the officer: "Take them out of here and give them the limit, push them out of here, take them out of here altogether." The testimony is not clear as to the time when these words were spoken to the officer. It seems fairly inferable from the plaintiff's testimony that it was immediately before she and her husband left the restaurant to go to the police station, where they were placed under arrest. From other testimony, it would appear that it was before the husband paid the bill. The time when they were spoken was a question of fact. There was testimony, also, to the effect that the female defendant prevented one Mrs. Lewis, a bystander, who said in the presence of the officer, "I would like to tell you how this thing was. I would like to see justice done to these people," from saying anything more and handled her roughly, and that the officer, when Mrs. Lewis attempted to hand her card to the plaintiff, stepped between them and told them it was time for them to be going; that after the plaintiff and her husband had left the restaurant with the police officer, Mrs. Lewis spoke with Mrs. Fennelly at the cashier's desk and the latter said to her: "It is not all over, they have arrested those people;" that after about fifteen or twenty minutes the police officer returned to the restaurant and told Mrs. Fennelly and the waiter that he had arrested the plaintiff and her husband and made reference in his conversation to drinking by the plaintiff and her husband and said something to Mrs. Fennelly and the waiter about appearing in court as witnesses, and that Mrs. Fennelly and another woman, who was at the time a guest of the hotel and a friend of the defendants and their agents and present in the restaurant at the time the plaintiff was there, testified at the trial of the plaintiff upon the complaint for drunkenness; and that the police officer had frequently been called to the premises of the defendants on other occasions. The police officer testified that while he and the plaintiff and the others were at the cashier's desk in the restaurant he said, referring to the plaintiff and her husband, "You people have been drinking." This statement might have been found to have been made in the presence of the agents of the defendants.

The evidence warranted a finding that Louis O. Jacot and Mrs. Fennelly were authorized by the defendants to do whatever in

their opinion was reasonably necessary in the conduct of the business and the preservation of order, even to the extent of calling the aid of the police and causing appropriate complaints to be made. *Robinson v. Doe*, 224 Mass. 319. *Murphy v. Bay State Wine & Spirit Co.* 212 Mass. 285. *Coughlin v. Rosen*, 220 Mass. 220. *Ryan v. Marren*, 216 Mass. 556. The words of both these persons to the police officer quoted above, and spoken in the presence of the female defendant, were enough to support a finding that he thereby was constituted the agent of the defendants to arrest them and institute against the plaintiff whatever criminal proceeding in his opinion could be sustained in any view of the acts of the plaintiff in the controversy at the restaurant. The conduct of the female defendant and of the police officer with respect to Mrs. Lewis, and her efforts to present the facts as she saw them, may rationally be thought to have some tendency to support the plaintiff's contention. The making of a complaint for drunkenness might fairly be regarded as within the terms of the directions given to the police officer under all the circumstances. If it be assumed that the plaintiff's husband paid the bill at the restaurant after the words were spoken to the officer heretofore quoted, there was no evidence tending to show that he was then or thereafter told by the female defendant or the agents of the defendants to disregard the request and directions theretofore given, and the jury might infer that this omission was not accidental but intentional. It cannot be said that the jury were not justified in finding that the agents of the defendants acting within the scope of their authority without reasonable cause and upon an improper motive set in motion the train of causation which naturally and proximately resulted in the arrest and accusation of the plaintiff. *Jones v. Schein*, 215 Mass. 586. *Dupre v. Childs*, 52 App. Div. (N. Y.) 306, affirmed 169 N. Y. 585. *Magar v. Hammond*, 183 N. Y. 387. The case is distinguishable in this particular from *Brown v. Boston Ice Co.* 178 Mass. 108, 110, and *Cotter v. Nathan & Hurst Co.* 218 Mass. 315. The case was for the jury and the rights of the defendants were carefully protected in the charge.

The case is quite distinguishable from *Burnham v. Collateral Loan Co.* 179 Mass. 268, where the agents of the defendant made a fair and full presentation of facts to the officer and left the

course to be pursued to his judgment without pressure or coercion on their part.

There was no error in the admission of evidence. Its order was within the discretion of the trial judge. In the opinion of a majority of the court the entry must be

Exceptions overruled.

COMMONWEALTH vs. JOSEPH HOMER.

Suffolk. January 15, 1920. — May 17, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE,
CARROLL, & JENNEY, JJ.

Robbery. Evidence, Of testimony before grand jury, To discredit witness, Relevancy and materiality. Witness, Before grand jury, Cross-examination. Practice, Criminal, Cross-examination of witness by district attorney, Argument of district attorney, Requests for instructions, Exceptions, Illegality of proceedings before grand jury. District Attorney. Jury and Jurors. Constitutional Law. Pleading, Criminal, Indictment.

At the trial of an indictment of a man for robbery of jewels, the complaining witness, a woman, testified in substance to intimate social relations with the defendant for months before the alleged robbery, that she came to be in fear of him because he abused her, that, finally, while in his room in a hotel in Boston, he by threatening her with a pistol compelled her to telephone to her hotel and direct her maid to bring the jewels to her, and that through threats he compelled her to take jewels from her ears and give them to him. This testimony was controverted by the defendant, and, in cross-examination, he sought to discredit the witness by showing that her testimony before the grand jury was different from that given by her at the trial in that therein no mention of a pistol was made by her. The evidence was excluded. *Held*, that the evidence should have been admitted.

An indictment charged that the defendant, a man, "did assault and beat" the complaining witness, a woman, "with intent to rob her and thereby did rob and steal from the person of said" witness one diamond collar, two diamond brooches, one pearl necklace, seven finger rings, two diamond studded watches and three other brooches. At the trial, there was evidence warranting findings that, by reason of fear of the defendant and by reason of violence inflicted upon her and the holding of a pistol in her face and the placing of his arm upon her shoulders, the complaining witness at his direction and command telephoned from his hotel to her own for her jewels, that they were delivered to him by her maid while she was in an adjoining bathroom and that she was compelled by the defendant to remove earrings from her ears and against her will to deliver them to him. *Held*, that there was sufficient evidence to support the indictment.

In order to prove the crime of robbery, it is not necessary to prove that the defendant took the property from the person of the owner; it is enough if, when the property was in the owner's protection and control, he was compelled to surrender it by violence and fear caused by the defendant.

As the indictment above described was tried, the question which the jury had to decide was, whether the jewels were taken from the owner by force and against her will, the defendant contending that they were delivered to him voluntarily by the owner as security for money which he had left with her. At the close of the evidence, the defendant asked for and the judge refused to give instructions based on an assumption that the defendant procured possession of the jewels in an honest belief that he had a right to do so to satisfy a debt due him. *Held*, that the requests rightly were refused because there was no evidence to which they were applicable.

In the indictment above described, the robbery was alleged to have been committed in May, 1917. In cross-examination of the defendant at the trial, the district attorney, subject to an exception by the defendant, was permitted to make several inquiries as to whether he filed or caused to be filed for him a petition in bankruptcy in 1913, to all of which he replied negatively. When the first question was put, the defendant asked if the record was to be offered, and the reply was that the "information will be forthcoming in due time." No record of any bankruptcy proceedings was offered at any time. This court, because another exception of the defendant was sustained, did not deem it essential to decide whether it was reversible error to admit the evidence, but *stated* that such a method of cross-examination was highly prejudicial to the defendant, and that, irrespective of whether the district attorney believed that a petition in bankruptcy had been filed, an unfair advantage was taken of the defendant in putting the questions.

One employed by the defendant as a secretary and bookkeeper was permitted, at the trial above described, subject to exceptions by the defendant, to be asked a series of questions as to whether, on sundry occasions, knowledge had come to her that "the authorities" were making an inquiry as to the defendant "selling dope." All answers were in the negative. Without determining whether the exceptions to the evidence should be sustained, this court *stated* that the method of cross-examination was highly improper and prejudicial to the defendant, being an attempt by unfair means to belittle him and render him unworthy of respect or credit.

If a district attorney, in his closing argument at the trial of an indictment, makes an untrue statement of law, the attention of the judge should be called thereto at once; and an exception to a refusal to grant a request, presented after the close of the argument, for an instruction that the statement was not a true statement of the law, must be overruled.

At the trial of the indictment above described, the complaining witness in cross-examination was asked what she did with money realized from pawning her jewels on an occasion previous to the alleged robbery, and answered that she used it to pay the debts of other people. The judge, subject to an exception by the defendant, permitted the district attorney to recall the witness and to ask her if, at the time the jewels were pawned, she had money of her own, and, also, if she was able to pay her debts and had used her money in paying the debts of others, and she answered affirmatively. *Held*, that the admission of the testimony was within the discretion of the judge.

At the trial of the indictment above described, it appeared that the defendant was a

dentist and had performed services as such for the complaining witness, and the defendant was permitted to show the value of that work. The defendant offered and the judge excluded evidence as to the reputation of the defendant as a dentist. *Held*, that the evidence was irrelevant and properly was excluded.

Testimony by affidavit by a former maid of the complaining witness at the trial above described having been admitted to show improper relations of that witness with the defendant, the witness was recalled by the district attorney and was permitted to be asked how the affiant came to leave her employ, and answered, "I discharged her," and the defendant excepted. *Held*, that, while the evidence properly might have been excluded, as the bias which one witness at a criminal trial feels toward another is not a material matter, under the circumstances of the statements in the affidavit, no reversible error was shown. An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge made against the defendant, comes too late if it is presented for the first time after a general plea to the indictment, a trial and a verdict of guilty, by motions for leave to withdraw the plea and to file a plea in abatement and other pleadings adapted to raise the question of the legality of the indictment.

INDICTMENT, found and returned on July 5, 1917, charging that the defendant on May 12, 1917, "did assault and beat" Madge E. Wilbur, "with intent to rob her and thereby did rob and steal from the person of said Wilbur" one diamond collar, two diamond brooches, one pearl necklace, seven finger rings, two diamond studded watches, three other brooches, "of the property of said Wilbur."

In the Superior Court, the indictment was tried before *Lawton, J.* Material evidence and exceptions saved by the defendant are described in the opinion. The Leonie Foliere, whose affidavit is referred to in the opinion, testified that she was employed by Mrs. Wilbur as a maid from November 29, 1915, to April 7, 1917, and related in detail improper and immoral conduct on the part of Mrs. Wilbur toward the defendant and others.

The jury on June 27, 1918, found the defendant guilty. On February 25, 1919, after a motion for a new trial had been heard and denied and a bill of exceptions saved by the defendant at the trial had been filed, the defendant filed seven motions, all based on the contention that the indictment was illegal because unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge against the defendant, the motions being, respectively, a motion that the verdict be set aside and that the defendant be allowed to withdraw his plea and to file a plea in abatement; a motion that the verdict be set aside,

and that the defendant "be allowed to withdraw his plea for the purpose of filing a motion to quash the indictment, a motion to amend the record, to set aside and dismiss the indictment, to file a demurrer, or to file any or all of said motions or pleas, or to avail himself of whatever remedy would have been open to him before his plea of not guilty;" a motion to amend the record; a motion to quash the indictment; a plea to the jurisdiction; a special plea and motion to dismiss, and a motion in arrest of judgment:

The judge found that unauthorized persons were present with the grand jury as alleged, ruled that the granting or denying of each motion was within his discretion, and denied each motion; and the defendant alleged exceptions.

The case was argued at the bar in January, 1920, before *Rugg, C. J., Braley, De Courcy, Carroll, & Jenney, JJ.*, and afterwards was submitted on briefs to all the Justices.

J. T. Hughes, (T. J. Kenny & E. J. Flynn with him,) for the defendant.

D. J. Gallagher, Assistant District Attorney, for the Commonwealth.

CARROLL, J. The defendant was indicted for robbery of jewelry of the value of several thousand dollars from Madge E. Wilbur. There was evidence that the robbery took place in the defendant's room in the Hotel Touraine, Boston, on May 12, 1917. At this time Mrs. Wilbur was about fifty-nine years of age and the defendant was about thirty-six years of age. He was a dentist practising in Los Angeles, California, where they first met and where he did some dental work for her, the value of which was in dispute and for which he was not paid. There was much testimony concerning their relations during their stay in California. She admitted they danced together, visited several hotels and had been on automobile trips; and there was evidence which, if believed, tended to show that they had occupied the same room at different hotels. Certain jewelry, namely, a pearl necklace, a diamond collar and brooch, one locket and a watch, had been pledged by Mrs. Wilbur to secure a loan of \$3,500. The defendant paid this account on or about April 18, 1917, and these jewels were delivered to him, Mrs. Wilbur giving him a note for \$6,530, payable in six months with interest at six per cent. A receipt was made out to her, reciting that the note was given to secure a

loan of \$3,780 in cash and "bill for professional services to the amount of \$2,750.00."

In the spring of 1917, the defendant joined Mrs. Wilbur in Chicago, and they left on the same train for Boston, arriving on May 7. Before reaching the Back Bay station, he gave her a package containing \$6,520 in cash and the jewels, and said, "take care of this for me." She placed the money and the jewel case in the care of the clerk at the Copley Plaza Hotel where she and her maid were guests. According to her testimony she returned the money to the defendant on the following day. This was denied by the defendant. He, however, admitted that the jewelry which had been pledged and which he placed in the care of Mrs. Wilbur was returned to him on the Wednesday following his arrival in Boston. Between May 7 and May 12 she drove with the defendant to Plymouth Rock, the North Shore, attended Keith's theatre and visited the Boston Public Library. She testified that on May 12 they met at the Copley Plaza Hotel about noon and went from there in a taxicab to the Hotel Touraine, where she accompanied him to his bedroom; that he then demanded her jewelry, referring to certain jewels which were then in her possession, saying, "I want your jewelry. I was a d — fool for giving it up before. . . . This time I will not give it up;" that, standing before her, he produced a pistol, and told her he had the address of a relative of hers (meaning her brother) and had notified him she was ill in the hotel; that when her brother came he (the defendant) would tell him that she had come there of her own accord, that the brother would find her alone with him in his bedroom, and suggested, "what . . . [the] brother would think;" that the defendant further said that if her brother made any trouble, he would "give him this" (meaning the pistol which was then in sight) and "If that don't work, I have got another in my pocket in my closet;" that the jewels were then at the Copley Plaza Hotel and she requested him not to make her send for them, but after a considerable time "rather than not have him call . . . [her] brother" she said to the defendant "rather than have you do that, I will give you my jewels;" that she then went to the telephone and called the Copley Plaza Hotel; that the defendant, holding a pistol in his hand and his arm around her shoulder, said to her, "You be careful what you say, but say what I tell you to say;"

that she then wrote, at the dictation of the defendant, a note to her maid, enclosing an order to the cashier of the Copley Plaza Hotel, requesting the delivery of the package of jewels. She further testified that when telephoning the defendant held the pistol to her face; that he called a messenger and sent the note and order to her hotel; that, when the maid appeared at the Hotel Touraine, Mrs. Wilbur, at the defendant's orders, went into the bathroom, and while there the maid delivered to the defendant the package of jewels, consisting of seven rings, one watch, three pins, one lorgnette, three or four small pins and one earring, together with two small rings which had been taken from a drawer in Mrs. Wilbur's apartments at her direction; that when she came out of the bathroom she found the defendant with the jewels in his hands; that he gave her the lorgnette and "a small pin or two;" and made her take off her earrings and give them to him, and insisted that she write an order giving him permission to sell the jewels; that she protested, saying he had stolen them and she would have him arrested, to which he replied, "There is not one chance in a hundred that you will dare to have me arrested; you are too afraid of the notoriety and your reputation;" that she then wrote an order authorizing him to sell the jewels and use the money at his own discretion; that when the earrings were taken she asked him to let her go, but he refused, saying "I will take you home. I know what you will do if I let you out, you will have me arrested;" that about half past eleven that night the defendant went with her in a taxicab to the Copley Plaza Hotel and, on leaving her, said, "to be careful what she did or said;" and that he went to New York the same night, where he sold the jewels for \$11,550.

The defendant's version was as follows: When the money and jewels were given Mrs. Wilbur on the train, it was understood that she was to return both the money and the jewels on the following day; that on May 12 they met at the Copley Plaza about eleven o'clock in the morning and went together to the Hotel Touraine; the defendant gave her the key of his room, telling her its location; in about ten minutes he went to the room and found her there; they remained there from eleven thirty in the morning until eleven at night; he at no time had a revolver; during the conversation she said she had not brought the money as she promised, because she wanted to use some of it, and offered

him her jewelry; he then left the hotel and was gone three quarters of an hour; on his return he agreed to accept the jewelry if she would give him a receipt for the money she received from him, and an order to sell the jewelry, to which agreement she assented. He denied that threats of any kind were made, or that he dictated the form of the order, or said anything about her brother. He further testified that in addition to Mrs. Wilbur's maid, three persons came to the room, that twice a waiter brought food, and a messenger boy called; that when the maid rapped at the door, he stepped into the hall, closing the door behind him.

1. The defendant, during the cross-examination of Mrs. Wilbur, sought to discredit her by showing that her evidence before the grand jury was different from that given at the trial and thereafter formal proof was offered of her testimony before the grand jury. This was objected to by the district attorney on the ground that there was no contradiction. The judge excluded the offered evidence. There were several details referred to in the offer, in which it was claimed her evidence was contradictory. Many of these statements were not in fact contradictory, some of them were on immaterial points, and some of the alleged contradictions, now relied on, were not specifically called to the attention of the judge. But, in one respect, at least, there was a direct contradiction concerning an important fact testified to by Mrs. Wilbur. If her evidence were believed, for months while she was in California, she was abused and threatened by the defendant and had lived in fear of him, and when they were together in the Hotel Touraine in Boston, by reason of fear and threatened violence, she gave the jewels to him. In her testimony she several times referred to the pistol which the defendant carried; that she was forced to go to the telephone while he held the pistol to her face, and that through fear she took the earrings from her ears and gave them to him. This was denied by the defendant. He claimed he came into the possession of the property with her consent and by reason of an arrangement by which she voluntarily surrendered them. In this state of the evidence the possession of a pistol by the defendant was a matter of importance. If he used such a weapon in the manner indicated, the jury might well believe the testimony of Mrs. Wilbur. If he had no such weapon, they might doubt her story and could find that the crime of robbery was not committed. If in

relating all the important facts connected with the crime before the grand jury, she said nothing about a pistol, except that the defendant intended to shoot her brother, and made no statement indicating that this weapon was exhibited in her presence, then the defendant had a right to show this contradiction and the jury could consider it as bearing upon an important and significant fact testified to by Mrs. Wilbur. The attention of the judge was called to this particular matter, and her evidence before the grand jury in contradiction of the testimony given by her at the trial, was admissible. *Commonwealth v. Mead*, 12 Gray, 167. See *Commonwealth v. Harris*, 231 Mass. 584, 586. This exception of the defendant's must be sustained.

2. There was sufficient evidence to support the indictment. The jury could find that through fear of the defendant and by reason of the violence inflicted upon her, she sent for the jewels and they were delivered by her maid while Mrs. Wilbur was in the bathroom; that she was compelled by the defendant to remove the earrings from her ears and against her will to deliver them to him; that he committed an assault and battery upon her by holding the pistol to her face and placing his arm upon her shoulders.

The defendant asked for several requests based on the fact that the jewels were delivered to the defendant by the maid while Mrs. Wilbur was in the bathroom, the defendant contending that because of this fact it could not be found that the property was taken from her person. There was abundant evidence that the earrings were taken from her ears and while in fear of the defendant delivered to him. As to the jewelry delivered by her maid, it was not necessary, in order to establish the crime of robbery, to prove that the property was taken from the person of the owner. It was enough if it was in her protection or control, and that by violence or putting in fear, she was compelled to surrender it. Moreover, there was evidence that after the jewels were delivered to the defendant, he brought them into the room and in the presence of the owner, selected such parts as he desired and permitted her to keep one or two articles. "A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." Report of Penal Code of Mass. (1844), Robbery, par. 5. When the owner is

kept in one room of a house and is forced to tell where his property may be found in another room and the assailant goes there and takes the property, it has been held that such a taking is robbery. *State v. Calhoun*, 72 Iowa, 432. *Clement v. State*, 84 Ga. 660. There was no error, therefore, in refusing the defendant's requests that the Commonwealth had failed to prove the crime of robbery because there was no taking from the person. *Hill v. State*, 145 Ala. 58, 60. *Hill v. State*, 42 Neb. 503, 527. *O'Donnell v. People*, 224 Ill. 218, 225. *State v. McAllister*, 65 W. Va. 97, 104. *Turner v. State*, 1 Ohio St. 442. *Houston v. Commonwealth*, 87 Va. 257, 264. *United States v. Jones*, 3 Wash. C. C. 209, 216. *In re Ezeta*, 62 Fed. Rep. 964, 992. See *People v. Madas*, 201 N. Y. 349, 352.

3. The defendant requested the judge to rule, "if the defendant honestly believed that he had a legal right to take said jewelry then he must be acquitted," and "If the defendant procured the possession of jewels of Mrs. Wilbur's for the purpose of obtaining money with which to satisfy a debt which he believed to be legally due him and believed that he had a legal right so to obtain said property and so to apply said proceeds, then the defendant cannot be convicted of larceny." These requests were based on the contention of the defendant that inasmuch as the money given to Mrs. Wilbur by the defendant had not been returned and was still due him, he did not commit the crime of robbery if in order to secure the payment of this debt, by force and violence he carried away her personal property. As the case was tried, the question which the jury had to decide was whether the jewels were taken from the owner by force and against her will, the defendant contending that the jewels were delivered to him voluntarily by the owner as security for the money which he had left with her. These requests, therefore, were properly refused. Since there was no evidence to which the requests were applicable, it is unnecessary to consider whether they were sound. See *Commonwealth v. Burton*, 183 Mass. 461; *Commonwealth v. Peakes*, 231 Mass. 449, 457. The instruction given by the judge was sufficiently favorable to the defendant.

4. On cross-examination the defendant was asked if he had filed a petition in bankruptcy during 1913. To this he answered that he had not. He was also asked by the district attorney, "Did you at any time file a petition in bankruptcy?" to which he answered in the negative. And again, "Was there a petition filed

in your behalf by your direction by anybody at any time, a petition in bankruptcy?" To this question he replied, "Not that I know of," whereupon the district attorney inquired again, "Are you sure about that?" and the defendant said "Yes." All of this evidence was allowed against the defendant's exception. When the question was first put, the defendant's counsel asked if the record was to be offered and the reply was made that the "information will be forthcoming in due time." No record of any bankruptcy proceeding was at any time offered.

As the defendant's exceptions must be sustained for the reasons already stated, we do not deem it essential to decide whether it was reversible error to admit this evidence. It is proper to say, however, that we consider this method of cross-examination highly prejudicial to the defendant. If the district attorney knew that a petition in bankruptcy had not been filed, the suggestion of its filing implied in the question was an attempt by unfair means to discredit the accused, to unjustly prejudice the jury against him and to deprive him of his right to a fair and impartial trial. If the district attorney believed that a petition in bankruptcy proceedings had been filed, it was an attempt to establish an immaterial but harmful fact in an improper way. The accused was on trial for a most serious felony and he was entitled to a fair trial according to the settled rules of law. In either event, whether the defendant's bankruptcy was believed to be false or true, an unfair advantage was taken in putting the questions. See 3 Wigmore on Ev. § 908. *Gale v. People*, 26 Mich. 157, 161. *People v. Wells*, 100 Cal. 459, 462.

5. The defendant's secretary and bookkeeper was examined by the district attorney as follows: "Don't you know, Miss Montgomery, and didn't Mrs. Wilbur when you went out there to that hotel tell you, that the reason she sent for you was because the federal authorities were following her up to find out that Homer had been selling dope?" She replied in the negative, and although the defendant objected and excepted, the district attorney was again permitted to ask, "Didn't she [Mrs. Wilbur] say some authorities were investigating the sale of dope by Homer?" Answer: "No, sir." And after other questions bearing on this matter had been put and answered, the question was asked, "Did Mrs. Wilbur at any other time except those occasions about which

we are now talking, your visits after Homer had left, say anything to you about being inquired of as to Homer's selling dope?" to which she answered, "No, sir." Further inquiries were made bearing on this subject. The attention of the witness was then directed to a message referred to in a telegram sent to the defendant at Chicago, and she was asked, "Wasn't that message relating to the matter of the authorities being after Homer for selling dope?" This was objected to and the witness answered, "No, sir." There was no evidence whatever to support the intimations contained in these questions. What we have just said in discussing the previous exception applies with equal if not greater force to this question. It was an attempt by unfair means to belittle the prisoner and render him unworthy of respect or credit. We can conceive of no reason prompting these questions except the desire to discredit him. Even if the charge were true and the evidence was introduced to discredit the defendant as a witness by showing his conviction of a crime, this fact could be shown only by the record. See *Commonwealth v. Walsh*, 196 Mass. 369.

6. The robbery was alleged to have taken place on May 12. No complaint was made against the defendant until June 23, when a complaint was made in the Municipal Court of the City of Boston. This matter was the subject of comment by the defendant's attorney, and the district attorney said in his argument to the jury, in substance, that the defendant could not be extradited from New York on a mere complaint, that the "only basis of extradition is a grand jury indictment." The defendant asked the judge to instruct the jury that this statement of the district attorney was not the law. The request was refused. Even if we assume that this argument of the district attorney's was improper, the attention of the judge should have been called to it at once when the statement was made. It was not until the argument was finished that his attention was called to it. It was then too late. *Commonwealth v. Richmond*, 207 Mass. 240, 250. *London v. Bay State Street Railway*, 231 Mass. 480.

7. Mrs. Wilbur was recalled and was asked by the district attorney if, at the time the jewels were pawned, she had money of her own, to which she answered, "Yes." She then was asked if she was able to pay her debts and if she had used her money in paying the debts of others, to which she gave an affirmative reply,

to all of which the defendant excepted. The judge admitted the evidence, saying "in view of your cross-examination in regard to what was done with the money, and she said she used it to pay debts of other people with, that it is a proper subject for inquiry." We see no reversible error in this. It was within the discretion of the presiding judge to admit the evidence.

The evidence of the witness Good concerning the defendant's reputation as a dentist was properly excluded. The defendant was permitted to show the value of the work done by him for Mrs. Wilbur. His reputation was not important.

After the affidavit of one Leonie Foliere, formerly employed by Mrs. Wilbur, had been introduced in evidence by the defendant, Mrs. Wilbur was recalled and asked how the affiant came to leave her employment, and she answered "I discharged her," to which question and answer the defendant excepted. Considerable discretion must be left to the trial judge in deciding under what circumstances and to what extent the bias of a witness against the defendant in a criminal case, or the parties in a civil case can be shown. The evidence now under consideration could without error have been excluded, as the bias or feeling which one witness has for or against another witness is not a material matter; but in view of the peculiar statements in the affidavit, with some hesitation we come to the conclusion that there was no reversible error in admitting the evidence. See *Koplan v. Boston Gas Light Co.* 177 Mass. 15, 23.

8. After the verdict of guilty, the defendant filed several motions and pleas based on the fact that persons other than the witnesses testifying were present before the grand jury when the matter of the indictment was heard. *Commonwealth v. Harris*, 231 Mass. 584. The defendant had pleaded not guilty and after that plea was entered he was not, of right, entitled to retract and plead anew. It was too late for him, after the general plea of not guilty was entered, to question the validity of the indictment or the action of the grand jury. *Lebowitch, petitioner, ante*, 357. *Commonwealth v. Barronian, ante*, 364. There was no error in the manner in which the pleas and motions were dealt with by the presiding judge. *Commonwealth v. Tucker*, 189 Mass. 457, 463.

Except as pointed out, we discover no error in the conduct of the trial.

Exceptions sustained.

EDWARD J. PROCTOR vs. MICHAEL J. DILLON.

Suffolk. March 18, 1920. — May 17, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Jurisdiction. Admiralty. Negligence, Employer's liability. Ship. Practice, Civil, Ordering verdict. Pleading, Civil, Declaration. Words, "Indemnity," "Compensation," "Damages."

If a motion by the defendant, at the close of all the evidence at the trial of an action at law, that a verdict be ordered in his favor is denied by the judge without asking the defendant to point out more particularly the propositions of law upon which he relies, and the defendant alleges an exception, it is open to the defendant in this court to raise any question of law actually involved.

One employed on a ship as ship's cook and seaman, who receives personal injuries when boarding his ship in tidewater by reason of the breaking of a defective ratline, which properly was being used by him and which should have been kept in a safe condition by the owner of the ship, may recover damages for his injuries in an action of tort at common law against the owner of the vessel in the Superior Court, such right being reserved by the provisions of 36 U. S. Sta. at Large, 1091, 1161, saving "to suitors in all cases," from the exclusive jurisdiction of all "causes of admiralty and maritime jurisdiction" vested in the federal courts, "the right of a common law remedy where the common law is competent to give it."

In the action above described, it was *held*, that the plaintiff was entitled to recover full compensatory damages.

A declaration in an action of tort by one employed as ship's cook and seaman against the owner of the ship, which alleged that the owner owed to him as a member of the crew the duty to keep and maintain the ship and her rigging, furnishings and appurtenances in a safe condition and that "by reason of the negligence" of the defendant a ratline had become defective, weakened and unsafe, whereby the plaintiff suffered injuries while the ship was lying alongside a wharf or pier in tidewater, plainly describes a maritime tort and sets out a cause of action entitling the plaintiff to "indemnity" for his injuries. Following *The Osceola*, 189 U. S. 158, 175.

The allegation in the declaration above described that the condition of the ratline arose "by reason of the negligence" of the defendant, and an instruction to the jury at the trial which required the plaintiff, in order to recover, to prove negligence of the defendant with respect to the ratline, were not harmful to the defendant, whether the basis of recovery for the maritime tort was that the owner was an insurer of the fit condition of the proper appliances appurtenant to the ship, or that he was guilty of such a failure to perform his duty as constituted negligence on his part.

It *seems*, that, according to the practice of the admiralty courts, the right of recovery by the seaman under the circumstances above described rests upon proof of negligence of the owner.

If a member of the crew of a ship, which belongs to two owners and is managed by only one of them, receives personal injuries while in tidal waters by reason of a defective condition of a ratline which it was the duty of the owners to keep in a fit condition, he may recover full compensatory damages in an action against the managing owner only.

TORT by a member of the crew of the fishing schooner *Florida* against one alleged in the declaration to be "the owner" of the schooner, for personal injuries resulting from a fall on November 5, 1912, caused by the breaking of a ratline which had been allowed to become defective through alleged "negligence" of the defendant. Writ dated September 26, 1916.

In the Superior Court, the action was tried before *Fessenden*, J. Material evidence is described in the opinion. At the close of the evidence, the defendant moved that a verdict be ordered for him. The motion was denied. He then asked for the following, among other rulings:

"2. If there was any duty imposed by law or otherwise upon the owners of the schooner *Florida*, such duty was imposed to the extent of their ownership upon all the owners, so that whatever duty was thus owed was owed by both Michael J. Dillon and Edward A. Proctor, the other part owner of the schooner."

"6. The plaintiff may not pick out one of two co-owners of a boat and impose upon him liability without at the same time suing the other co-owner.

"7. The agent of the owners of a boat merely as agent cannot be responsible to the crew of such vessel. If any duty exists, it is a duty of the owners themselves."

The judge refused to make the rulings. The jury found for the plaintiff in the sum of \$2,000; and the defendant alleged exceptions.

E. C. Stone, for the defendant, submitted a brief.

S. R. Jones, for the plaintiff.

RUGG, C. J. This is an action of tort at common law wherein the plaintiff seeks to recover damages for personal injuries sustained by him on November 5, 1912, while boarding the *Florida*, a fishing schooner lying in tidewater at a wharf in Gloucester. The schooner was at the time fitted out, and was ready to put to sea the next morning on a fishing voyage. The plaintiff was cook and seaman, had put his clothes aboard, and was under the direc-

tion of the master or captain. In going from the wharf to the vessel a little after nine o'clock in the evening when the tide was well down, the plaintiff caught hold of the rigging and stepped on the ratline, which broke causing him to fall and receive injuries. This ratline, a cross piece of rope corresponding to the rung of a ladder, was the first one under the lantern board in the fore rigging on the starboard side. When the vessel was on a fishing voyage the ratlines were used by members of the crew to go aloft looking for swordfish.

There was evidence tending to show that it was the usual method of boarding the ship to step upon the ratline, that this part of the Florida was weak and "all dry rot," a condition which might have been discovered by proper inspection, and that it was the duty of the defendant as managing owner of the vessel to make such inspection and keep the vessel in repair and in seaworthy condition.

The contention chiefly urged by the defendant now is that, since the vessel was in navigable waters and the plaintiff one of her crew, the rights and liabilities of the parties are those established by the law of the sea and must be determined wholly according to the principles of admiralty and not at all by those of the common law, and that the plaintiff is not entitled to recover in this action, and that the judge erred in refusing to order a verdict for the defendant.

1. This point does not appear to have been specifically presented at the trial in the Superior Court. There was, however, a general request by the defendant that a verdict be ordered in his favor. Upon the refusal of such a request, "if the judge does not ask the requesting counsel to point out more particularly the propositions of law upon which he relies, it is possible to raise in this court any question of law actually involved," even though it was not referred to nor thought of by the judge or counsel at the trial. *Parrot v. Mexican Central Railway*, 207 Mass. 184, 190. *O'Donnell v. North Attleborough*, 212 Mass. 243, 245. *Noyes v. Caldwell*, 216 Mass. 525, 527. Conversely, the ruling of the Superior Court will be sustained if sound even though the judge in making it may have stated or been moved by reasons erroneous in law. *Randall v. Peerless Motor Car Co.* 212 Mass. 352, 384. *Putnam v. United States Trust Co.* 223 Mass. 199, 203.

2. Plainly the case at bar relates to a maritime tort. It arose upon a seagoing vessel in navigable waters. In *The Plymouth*, 3 Wall. 20, at page 36, are found these words, quoted with approval in *Atlantic Transport Co. of West Virginia v. Imbrovek*, 234 U. S. 52, at page 60: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." *Peters v. Veasey*, 251 U. S. 121.

3. It is provided in the Constitution of the United States by art. 3, § 2, that "The judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction," and by art. 1, § 8, that "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States." Pursuant to this jurisdiction and authority it was enacted by the Judicial Code, act of March 3, 1911, c. 231, § 24, cl. 3, and § 256, cl. 3; 36 U. S. Sts. at Large, 1091, 1161, in force at the time of the injury to the plaintiff, that exclusive jurisdiction is vested in the courts of the United States of all "causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." See now 40 U. S. Sts. at Large, 395, of the acts of Congress, approved October 6, 1917.

4. The Constitution of the United States and an act of Congress being involved in the determination of this question, decisions of the Supreme Court of the United States are of binding force. Numerous cases have been decided by that court which are pertinent to the facts in the case at bar. It was said in *Manchester v. Massachusetts*, 139 U. S. 240, at page 262, "Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on maritime contracts or for maritime torts can be maintained in the State courts." In the opinion in *The Hamilton*, 207 U. S. 398, at page 404, are these words by Mr. Justice Holmes: "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it,' Rev. Sts. § 563,

cl. 8, [now Judicial Code, § 256, cl. 3,] leaves open the common law jurisdiction of the State courts over torts committed at sea. This, we believe, always has been admitted. *Martin v. Hunter*, 1 Wheat. 304, 337; *The Hine v. Trevor*, 4 Wall. 555, 571; *Leon v. Galceran*, 11 Wall. 185. . . . Accordingly, it has been held that a statute giving damages for death caused by a tort might be enforced in a State court, although the tort was committed at sea. *American Steamboat Co. v. Chase*, 16 Wall. 522." To the same point are *Sherlock v. Alling*, 93 U. S. 99, *The Belfast*, 7 Wall. 624, 644, 645, *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 644. See *The Minnesota Rate Cases*, 230 U. S. 352, 409. It is elementary that the maritime law by itself and unaided by statute affords no remedy whatever for the death of a seaman. *The Harrisburg*, 119 U. S. 199. *The Alaska*, 130 U. S. 201. *La Bourgogne*, 210 U. S. 95. Thus the maritime law in a particular relating to substance and not to form has received by recognition and approval of the Supreme Court of the United States an important modification through the statute law of one of the States. The common law rules of liability and measure of damages appear to have been recognized and applied in actions arising at common law founded on maritime torts in *Belden v. Chase*, 150 U. S. 674, and *Quebec Steamship Co. v. Merchant*, 133 U. S. 375. See *Atlee v. Packet Co.* 21 Wall. 389, 395. In reliance upon these principles numerous decisions have been rendered by this court. It was held in *Kallock v. Deering*, 161 Mass. 469, in an opinion written by Mr. Justice Holmes, in substance and effect that, when the relief for a maritime tort was sought in common law courts, the remedy both in its substance and its form was afforded by the common law, and that the common-law courts did not undertake to enforce the principles of admiralty law. That was an action of tort at common law to recover damages sustained by the plaintiff while on board a vessel in harbor through the breaking of a triangle on which he was sitting and scraping a mast. After deciding that upon the facts disclosed there was no remedy at common law, the contention, that a different doctrine obtained in admiralty and "that the law^d which would be administered by the courts especially constituted for the affairs of seamen" ought to be followed, was considered. It was disposed of in these words: "The case most relied on is *The A. Heaton*, 43 Fed. Rep. 592, followed by *The Frank & Willie*, 45 Fed. Rep. 494, and

The Julia Fowler, 49 Fed. Rep. 277. Compare *Morse v. Slue*, 1 Vent. 238; S. C. 3 Keb. 135, 1 Molloy de Jure Marit. book 2, c. 2, § 2. If the American cases meant that the admiralty courts had worked out the liability of the ship for the acts of the captain from their own peculiar principles, it might be necessary to inquire whether the personal liability of the owner necessarily followed from the same premises, and if it did, why the common law should yield to the admiralty rather than the admiralty to the common law. But it hardly is to be expected that different views of the substantive law should be enforced by the same judges sitting in different courts. In *The A. Heaton*, Mr. Justice Gray did not declare a doctrine peculiar to the admiralty, he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with the cases in this Commonwealth, and which has been explained by a later decision of the court which rendered it. *Chicago, Milwaukee & St. Paul Railway v. Ross*, 112 U. S. 377. See *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368. Under these circumstances the Circuit Court cases do not seem to us a sufficient reason for departing from the common law because the accident happened on board ship. Moreover, it is very plain that we cannot adopt the admiralty law as a whole. We cannot divide the damages when the plaintiff has been guilty of contributory negligence, as was done in *The Julia Fowler*." Since that decision cases have been adjudicated according to its authority either by express reference or implied recognition, and in most, if not all of them, no argument has been addressed to this court founded upon admiralty law as affording either a different standard of liability or a dissimilar measure of damages; but the principles of the common law have been applied to the determination of claims for personal injuries arising out of maritime torts. *Perkins v. Furness, Withy & Co.* 167 Mass. 403. *Murch v. Thomas Wilson's Sons & Co.* 168 Mass. 408. *Johnson v. Holmes*, 173 Mass. 514; S. C. 188 Mass. 170. *Carroll v. Metropolitan Coal Co.* 189 Mass. 159. *Crimmins v. Frederick Leyland & Co. Ltd.* 202 Mass. 17. *Souden v. Fore River Ship Building Co.* 223 Mass. 509. *Ford v. Allan Line Steamship Co. Ltd.* 227 Mass. 109. *Collins v. McKie Lighter Co.* 230 Mass. 281. *Kenneally v. Oceanic Steam Navigation Co. Ltd.* 230 Mass. 446. *Duart v. Simmons*, 231 Mass. 313. *Ford v. Trident Fisheries Co.* 232 Mass. 400. *Cambra v. Santos*, 233

Mass. 131. *Morrison v. Commercial Tow Boat Co.* 227 Mass. 237. *Freeman v. United Fruit Co.* 223 Mass. 300. See *Hanley v. Eastern Steamship Corp.* 221 Mass. 125. In substance common law principles had been followed in earlier decisions, respecting injuries or wounds received in the service of the ship or violations of duty which might be thought to be maritime torts, without discussion of the bearing of admiralty law. *Johnson v. Boston Tow-Boat Co.* 135 Mass. 209. *Pingree v. Leyland*, 135 Mass. 398. *Benson v. Goodwin*, 147 Mass. 237. *Hayes v. Philadelphia & Reading Coal & Iron Co.* 150 Mass. 457. *Pierce v. Cunard Steamship Co.* 153 Mass. 87. *McGivern v. Thomas Wilson's Sons & Co.* 160 Mass. 370. See *Danvir v. Morse*, 139 Mass. 323. It is beyond doubt that under these principles the plaintiff is entitled to recover.

5. The contention is made by the defendant that since the decision in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and cases following it, there is no remedy at and in accordance with the principles of common law for an injury received under the circumstances here disclosed. Especial reliance in this connection is placed upon the decision in *Chelentis v. Luckenbach Steamship Co. Inc.* 247 U. S. 372. In that case the plaintiff, a fireman upon a steamship, not questioning the seaworthiness of the vessel or her appliances, and contending that he was injured while at sea through the negligence and an improvident order of a superior officer, sought to recover full indemnity in a common law court. Relief was denied, the court saying at page 382: "The work about which petitioner was engaged is maritime in its nature; his employment was a maritime contract; the injuries received were likewise maritime and the parties' rights and liabilities were matters clearly within the admiralty jurisdiction. . . . And unless in some way there was imposed upon the owners a liability different from that prescribed by maritime law, petitioner could properly demand only wages, maintenance and cure. Under the doctrine approved in *Southern Pacific Co. v. Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law. Such a substitution would distinctly and definitely change or add to the settled maritime law; and it would be destructive of the 'uniformity and consistency at which the Constitution aimed on all subjects of a commercial character

affecting the intercourse of the States with each other or with foreign States.” It further was said at page 383: “The precise effect of the quoted clause of the original Judiciary Act [now Judicial Code, §§ 24, 256] has not been delimited by this court and different views have been entertained concerning it.” It is not necessary for us to deal with that question in the present case, nor to attempt to determine how, if at all, the defendant’s contention is at variance with the express reservation “to suitors, in all cases,” of the “right of a common-law remedy, where the common law is competent to give it” found in § 24, cl. 3, and in § 256, cl. 3 of the Judicial Code, nor to undertake to analyze and to reconcile the various views expressed in the decisions, to some of which reference has been made.

6. The case at bar rests upon a different footing, separate and distinct from that especially assailed by the defendant. The plaintiff is entitled to recover in this action upon another principle. It was said in *The Osceola*, 189 U. S. 158, a libel *in rem* in admiralty for damages sustained by a seaman through negligence, at page 175, “Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions: 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff v. Metcalf*, 107 N. Y. 211. 3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure. 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.” The grounds of liability as thus stated were quoted with approval in *Chelentis v. Luckenbach Steamship Co. Inc.* 247 U. S. at pages 380, 381.

It is plain that the plaintiff was injured by reason of facts stated in proposition 2 above quoted, namely, the "unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." The ratline which broke was essential to the common and well recognized uses of the schooner. It was necessary for the seaman to depend upon the strength and soundness of the ratline in boarding the vessel or in debarking. The seamen of the Florida were required to use it also in the performance of their duties while at sea. The plaintiff was injured by the weakness and improper condition of the ratline. Under the principle declared in proposition 2 of the four propositions established in the *Osceola* and reaffirmed in the *Chelentis* case, the owner of the vessel is liable to the plaintiff, a seaman, for "indemnity" for his injuries. "Indemnity" in this connection is a word at least as broad in signification as is "compensation" or "damages," words commonly used in this Commonwealth to express the measure of recovery to which a plaintiff is entitled in actions of tort for personal injury through ordinary negligence. Compare *Hammond v. New York, New Haven, & Hartford Railroad*, 211 Mass. 549, 551, and *Sullivan v. Old Colony Street Railway*, 197 Mass. 512, 516. That measure of recovery presumably was awarded under appropriate instructions in the case at bar. That is the rule of recovery under the admiralty law for a maritime tort like that here disclosed. The present is a case where the cause of action arose under admiralty jurisdiction, but it is at the same time a cause where the right of common law remedy is reserved to the plaintiff under the judicial code, because the nature of the cause of action is such that the common law is competent according to its recognized methods to give a remedy. The breach of duty involved in a failure to maintain the vessel in a seaworthy condition or to supply and keep in order proper appliances appurtenant to the vessel does not differ in its essential characteristics from other breaches of duty which are commonly the subject of trial and adjudication in common law tribunals. The ascertainment of damages, or compensation or indemnity for personal injuries caused by breach of legal duty is the every day work of a common law court. It was said in *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 648, "if the suit be *in personam* against an individual defendant, with an auxiliary attachment

against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute . . . of a common law remedy." These words were quoted with approval in *Chelentis v. Luckenbach Steamship Co. Inc.* 247 U. S. 372, at page 384. The case at bar appears to us to fall precisely within these words. The point also appears to us to be covered by other decisions, the authority of which has not been impaired by *Southern Pacific Co. v. Jensen*, 244 U. S. 205, and *Chelentis v. Luckenbach Steamship Co. Inc.* 247 U. S. 372: *Martin v. Hunter*, 1 Wheat. 304, 337. *The Hine v. Trevor*, 4 Wall. 555, 571. *Leon v. Galceran*, 11 Wall. 185. *Manchester v. Massachusetts*, 139 U. S. 240, 262. *Workman v. New York*, 179 N. Y. 552. *Sherlock v. Alling*, 93 U. S. 99. See, also, in this connection, *Cornell Steamboat Co. v. Fallon*, 102 C. C. A. 345; 179 Fed. Rep. 293; *Thompson Towing & Wrecking Association v. McGregor*, 124 C. C. A. 479; 207 Fed. Rep. 209; *Scarff v. Metcalf*, 107 N. Y. 211; *Larson v. Alaska Steamship Co.* 96 Wash. 665.

7. The plaintiff's declaration sets out that he was one of the crew of the Florida, that to him the defendant as owner owed the duty to keep and maintain the schooner and her rigging, furnishings and appurtenances in a safe condition and that "by reason of the negligence" of the defendant the ratline had become decayed, weakened and unsafe, whereby the plaintiff suffered injuries while the Florida was lying alongside a wharf or pier in the port of Gloucester. This declaration plainly describes a maritime tort. It sets out a cause of action under proposition 2 of the opinion in *The Osceola*, 189 U. S. 158, 175, already quoted. If, as the defendant contends, he is not liable for negligence under the maritime law, that part of the declaration may be rejected as surplusage. If, however, the maritime law does not make the defendant liable as insurer of the good order of the proper appliances appurtenant to the ship, then the allegation of breach of duty amounting to negligence was necessary. Moreover, the defect in the declaration, if any, was apparent on its face and advantage should have been taken of it by demurrer. In any event the defendant has suffered no harm in this particular.

8. For the same reasons the defendant suffered no harm by reason of that portion of the charge which required the plaintiff

to prove negligence of the defendant in respect to the condition of the ratline. The defendant has no ground for complaint if the plaintiff was required to produce a higher degree of proof than the maritime law required. The right of recovery by a seaman for injuries arising under circumstances like those here disclosed appears to us to rest upon proof of negligence of the owner according to the practice of admiralty courts. It was said in substance and effect in *The Joseph B. Thomas*, 30 C. C. A. 333, at page 335, that the "pith and substance of all the decisions upon this subject, as expressed in a great variety of cases each having reference to the special facts and surroundings of the evidence," is that the duty of the owner to the seaman is "to exercise ordinary and due diligence and care in keeping" the ship safe against injury or danger in those respects as to which duty in that particular is owed to the seaman. This statement is supported by ample citation of authorities. *Leathers v. Blessing*, 105 U. S. 626, 629. *The France*, 8 C. C. A. 185. *Cothell v. Lamb*, 10 C. C. A. 634. *The Henry B. Fiske*, 141 Fed. Rep. 188, 190. *The Lyndhurst*, 149 Fed. Rep. 900. *Couch v. Steel*, 3 El. & Bl. 402, 407. *Smith v. Cook*, 164 Fed. Rep. 628. The owners of the ship owed the duty to the plaintiff "to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U. S. at page 175. Negligence simply consists in doing or omitting to do an act in violation of a legal duty. *Bernabeo v. Kaulback*, 226 Mass. 128, 131. It seems to us that the instructions as to negligence were appropriate. The case upon this point appears to be on all fours with *Atlantic Transport Co. of West Virginia v. Imbrovek*, 234 U. S. 52. That was a libel to recover for personal injuries sustained by the libellant while working as a stevedore in the employ of the Atlantic Transport Company unloading the Pretoria, a vessel lying in the port of Baltimore. The case on its merits was decided in the district court on principles of due diligence and negligence as those terms are defined, understood and applied in courts of common law. *Imbrovek v. Hamburg-American Steam Packet Co.* 190 Fed. Rep. 229, 238, 239. It was affirmed in a *per curiam* opinion in 113 C. C. A. 398, 408; 193 Fed. Rep. 1019. When the case came before the Supreme Court on *certiorari*, it was said by Mr. Justice Hughes at page 63: "The remaining question relates to the finding of negligence. It is urged that the neglect was that

of a fellow-servant and hence that the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place to work. . . . It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified." This seems to us to be a decisive determination of the matter against the contention of the defendant.

If, however, we are wrong in that, the defendant has suffered no harm. It is plain to us that the plaintiff could not have recovered under the instructions given without proving at least all that he would have been required to prove if the liability of the defendant was that which the latter now contends. There was ample evidence to support a finding of negligence. *Carroll v. Metropolitan Coal Co.* 189 Mass. 159. There was no reversible error in submitting the question of negligence to the jury nor in the charge touching it.

9. The defendant owned five eighths of the schooner. The defendant was the managing owner. As between himself and his co-owner he assumed the entire responsibility for keeping the vessel seaworthy and supplying and keeping in order the proper appliances appurtenant to her. The defendant and his co-owner together owed the duty to the plaintiff to keep the ratline in repair and in strong condition. It is a general and familiar principle of the common law that in cases of tort, where two or more are liable for the same cause of action, they are liable severally as well as jointly, and if one is sued alone the entire damages may be recovered against him. *Buddington v. Shearer*, 22 Pick. 427, 429. *Boston & Albany Railroad v. Shanly*, 107 Mass. 568, 579. *Corey v. Havener*, 182 Mass. 250. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 216, 217.

It was the exclusive obligation of the defendant under the subsisting arrangements between him and his co-owner to see to the condition of the ratline and keep it safe by repair or replacement. It was his personal failure to perform his duty in that particular which caused the injury to the plaintiff. There can be no doubt that under these circumstances a cause of action at common law arises in favor of the plaintiff against the defendant. *Osborne v. Morgan*, 130 Mass. 102. *Shannon v. Shaw*, 201 Mass. 393. *Fennell v. Peterson*, 225 Mass. 598. We are not aware of any principle of

maritime law which prevents the maintenance of such an action in the common law courts under the judicial code.

If the question be treated quite apart from authority and in accordance with the fundamental ethical rules of right and wrong, to which courts ordinarily resort for the settlement of conflicting contentions of parties in cases which are not within the sweep of any established principle of law, the same result is reached. The plaintiff has brought his action against the person whose failure in performance of duty has caused his injury. Whatever may be the rights of contribution of the defendant in admiralty, if any, against his co-owner, there seems to be no reason why the plaintiff should be denied a right of recovery against the person who directly has wronged him.

In *The Hine v. Trevor*, 4 Wall. 555, at page 571, it was said by Mr. Justice Miller respecting the remedy at common law, "This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the State. Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act." The present proceeding is a simple action at law to recover indemnity, damages or compensation for a maritime tort. It is a kind of remedy afforded by the common law as generally practiced and recognized without the aid of any enabling statute. It seems to us to come within the classification of remedies reserved to the suitor in common law courts by § 24, cl. 3, and § 256, cl. 3 of the judicial code. *The Hamilton*, 207 U. S. 398, 404, and cases cited. *The Belfast*, 7 Wall. 624, 644. *La Bourgogne*, 210 U. S. 95. As was said in *Rounds v. Cloverport Foundry & Machine Co.* 237 U. S. 303, 307, 308, "Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. [That is, different from proceedings *in rem* in admiralty.] *The Belfast*, *supra*, [7 Wall. 624]; *Taylor v. Carryl*, 20 How. 583, 598, 599; *The Robert W. Parsons*, *supra*, [191 U. S. 17]. And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a State statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam*.

Leon v. Galceran, 11 Wall. 185; see also *Johnson v. Chicago & Pacific Elevator Co.* 119 U. S. 388, 398, 399; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 646, 648. . . . As this court said in *Johnson v. Chicago & Pacific Elevator Co. supra*, in reviewing *Leon v. Galceran, supra*, it was held that 'the action *in personam* in the State court was a proper one, because it was a common law remedy, which the common law was competent to give, . . . that the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property; and that these views were not inconsistent with any expressed in *The Moses Taylor*, in *The Hine v. Trevor*, or in *The Belfast*.' The result of the decisions is thus stated in *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 646, 648. 'The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute (§ 563) of the common law remedy.' Whatever may be the precise scope of the word "remedy" as used in § 24, cl. 3, and § 256, cl. 3 of the judicial code in saving to suitors "the right of a common-law remedy," it seems to us that the plaintiff in respect of his right to sue the defendant alone is but employing the "remedy" expressly reserved to him by the act of Congress, and that he is not seeking to mar the "uniformity and consistency" of the maritime law which the Constitution of the United States preserves. *Chelentis v. Luckenbach Steamship Co. Inc.* 247 U. S. 372, 382.

This case appears to us to be expressly covered by the principle declared in *Belden v. Chase*, 150 U. S. 674. That was an action of tort brought in a common law court of the State of New York, wherein the plaintiff sought to recover damages against the owner of the yacht Yosemite for so negligently navigating her as

to sink a steamboat on navigable waters belonging to the plaintiff. The case was tried in the State courts and ultimately resulted in a final judgment in favor of the plaintiff. *Chase v. Belden*, 104 N. Y. 86; S. C. 16 N. Y. St. Rep. 528, affirmed in 117 N. Y. 637. The case then went to the Supreme Court of the United States by writ of error. It was said by Chief Justice Fuller at page 691, "This action was for a maritime tort committed upon navigable waters and within the admiralty jurisdiction, and the appellate jurisdiction of this court over questions national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common law remedy in a State court. The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision, has long prevailed in England and this country. *The Max Morris*, 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee v. Packet Co.* 21 Wall. 389. In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though the defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

Under these circumstances the plaintiff is entitled in our opinion to recover his whole damages against the defendant alone. There was no error in denying the requests for rulings by the defendant numbered 2, 6 and 7, which in various forms of words raised the point that one of the owners of the vessel could not be held to answer alone to the plaintiff, but that all the co-owners must be joined as defendants.

10. The only exceptions argued by the defendant are (1) that a verdict should have been ordered in his favor, (2) that his three requests for instructions numbered 2, 6 and 7 should have been granted, (3) that the question of negligence should not have been submitted to the jury. All his other exceptions are expressly waived on his brief. For the reasons already stated, we are able to discover no reversible error.

Exceptions overruled.

ROBERT BURNS vs. WILLIAM J. BURNS INTERNATIONAL DETECTIVE
AGENCY, INC.

Suffolk. January 12, 1920. — May 18, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, CROSBY, PIERCE,
CARROLL, & JENNEY, JJ.*Equity Jurisdiction*, To enjoin use of trade name. *Trade Name. Corporation.*

In a suit by one Robert Burns to restrain a corporation named William J. Burns International Detective Agency, Inc., from using the name "Burns Detective Bureau," "Burns Detective Agency" or "Burns Agency," there was evidence that the plaintiff was licensed by the city of Cambridge in 1909 as a private detective and in that year opened an office in Boston; that in January, 1911, he registered the name "Burns Detective Bureau" and thereafter until the present suit continued the detective business under that name and advertised and was listed under that name in the Boston city directory and the Boston telephone directory; that from 1903 to 1909 one William J. Burns was engaged in secret service work for the federal government and established a national reputation as a detective; that in 1909 he engaged in business privately and organized the defendant corporation, its name always containing the surname Burns but being changed twice; that in February, 1911, the defendant opened an office in Boston and was listed in the telephone directory as "Burns William J. National Detective Agency, Inc. The," and "Burns William J. International Detective Agency Inc. The" and also appeared in the Boston city directory for 1913 as "Burns Detective Agency, The William J. National, Inc." and in the Boston telephone directory in 1915 and 1916 as "Burns Detective Agency, The William J. International Inc.;" that the form of listing in the telephone directory of 1915 was requested by the defendant in order that its name might catch the eye of the public before it rested on the plaintiff's name. There was no evidence that the change in the listing was made for the purpose of inducing persons to do business with the defendant under the belief that they were doing business with the plaintiff. *Held*, that

(1) William J. Burns had a right to use his own name in his business as a detective and to incorporate and carry on a detective agency with the use of that name;

(2) The likelihood that the mere alphabetical arrangement in the telephone directory would mislead was not a sufficient reason for issuing an injunction, where it did not appear that the defendant attempted to hold itself out as the plaintiff, or to deceive the plaintiff's patrons;

(3) The bill should be dismissed.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 18, 1915, alleging that from the year 1909 to the date of filing the

bill the plaintiff had continuously used the names "Burns Agency," "Burns Detective Agency," and "Burns Detective Bureau," and that on January 27, 1911, he registered with the Secretary of State for the Commonwealth the name of "Burns Detective Bureau," and praying that the defendant be restrained from using any of those names.

The defendant filed a demurrer and an answer. The demurrer was heard by *Braley, J.*, and was overruled, and the suit was referred to a master. Findings of the master as to the origin of the defendant were as follows: "The defendant was incorporated in the State of New York, December 30, 1909, under the name of 'Burns & Sheridan National Detective Agency,' to carry on the business of private detective. On March 20, 1911, its name was changed to 'The William J. Burns National Detective Agency, Inc.' and on October 15, 1913, to its present name. In February, 1911, the defendant opened an office in Boston. It has about twenty-eight offices distributed throughout the larger cities of the United States and in Montreal, London and Paris. The New York, Philadelphia, Pittsburg, Chicago, and St. Louis offices, and perhaps one or two others, were opened before 1911. Since the incorporation of the defendant it has been entitled to the exclusive services of William J. Burns, who is head of its agencies. Prior to 1903 Burns was an operative of the United States Secret Service of the Treasury Department, being one of more than fifty operatives who were subject to assignment by the Chief of the Service. In 1903 he was transferred to the Interior Department, where he remained for about three years, serving at various times as Special Agent of the Land Office, Special Agent of the Interior Department, and Special Agent of the Indian Division. While connected with the Interior Department he engaged in the 'land fraud' investigations in California, Oregon, and other parts of the country. In 1906 Burns was given leave of absence from the government service, and until 1909 engaged in the 'graft investigation' in San Francisco. In 1909 (about October) he, with others, opened an office in New York City for detective business under the name of 'Burns & Sheridan National Detective Agency.' Shortly thereafter the business was incorporated under that name, as above stated."

Other findings of the master are described in the opinion.

The suit came on to be heard before *Jenney, J.*, upon exceptions by both parties to the master's report and was reserved by him, upon the pleadings, the master's report and the exceptions thereto, for determination by this court.

The case was argued at the bar in January, 1920, before *Rugg, C. J., Braley, De Courcy, Carroll, & Jenney, JJ.*, and afterwards was submitted on briefs to all the Justices.

P. H. Kelley, for the defendant.

H. W. Ogden, for the plaintiff.

CARROLL, J. This is a suit in equity to restrain the defendant from using the name Burns Detective Bureau, Burns Detective Agency or Burns Agency. The master found that the plaintiff, in November, 1909, was licensed as a private detective by the city of Cambridge where he lived, and in that year opened an office in Boston, which he still maintains. He did business principally in New England. On January 27, 1911, he filed with the Secretary of the Commonwealth a form of advertisement, "Burns Detective Bureau," and a certificate of record was issued. From that time until the present he used the name "Burns Detective Bureau" on his signs and in the Boston city directory. He was listed in the Boston telephone directory as "Burns Detective Bureau," and under this name advertised in the newspapers and other publications. Since 1911 he has continued the detective business, advertising under the name of "Burns Detective Bureau," and was known among those interested in the private detective business in the vicinity of Boston. The defendant opened an office in Boston in February, 1911. It had offices distributed throughout the larger cities of the United States, and in Montreal, London and Paris, and is entitled to the exclusive service of William J. Burns. In October, 1913, its name was changed from "The William J. Burns National Detective Agency, Inc." to its present one. It appeared in the Boston directory and in the telephone directory as "Burns William J. National Detective Agency Inc. The," and "Burns William J. International Detective Agency Inc. The." It also appeared in the business listing of the Boston city directory for 1913 as "Burns Detective Agency The William J. National, Inc." and in the telephone directory for Boston and vicinity in 1915 and 1916 as "Burns Detective Agency, The William J. International Inc."

The master found that the use of the names Burns Detective Bureau, Burns Detective Agency, and Burns Agency by the defendant, without limiting words or words of explanation, would be likely to confuse the defendant's agency with the plaintiff's, and induce persons to do business with the defendant under the belief they were dealing with the plaintiff. But he also found that the defendant did not advertise nor cause its name to appear in any written or printed publication as "Burns Detective Bureau" and did not use the words "Burns Detective Agency" or "Burns Agency" without limiting or explanatory words. He made this specific finding: "I find, however, that the arrangement of the name 'Burns Detective Agency, The William J. International, Inc.' is more likely to induce persons to do business with the defendant under the belief that they are doing business with the plaintiff, since this arrangement takes the words 'William J.' from the emphatic position at the beginning of the name and places in the emphatic position the words 'Burns Detective Agency,' and since such arrangement of words gives precedence to the defendant's name over the plaintiff's in alphabetical listing in the telephone directory or elsewhere." He further found that this form of listing in the telephone directory of 1915 was requested by the defendant in order that "the defendant's name might catch the eye of the public before it rested on the plaintiff's name." But there was no evidence that the defendant made either of the changes in its name, or secured the change in its listing in the telephone directory for Boston and vicinity, for the purpose of inducing persons to do business with it, under the belief that they were doing business with the plaintiff.

William J. Burns had the right to use his own name in his business as a detective, to incorporate and carry on a detective agency. "Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria*. But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them,

and thus produce injury to the other beyond that which results from the similarity of names." *Russia Cement Co. v. LePage*, 147 Mass. 206, 208, 209. The same principle was stated by Chief Justice Gray in *Gilman v. Hunnewell*, 122 Mass. 139, 148: "A person may have a right in his own name as a trade-mark, as against a person of a different name. . . . But he cannot have such a right as against another person of the same name, unless the defendant used a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture." To the same point are *C. H. Batchelder & Co. Inc. v. Batchelder*, 220 Mass. 42, *Kaufman v. Kaufman*, 223 Mass. 104. See also, *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140; *L. E. Waterman Co. v. Modern Pen Co.* 235 U. S. 88, 94; *Stiz, Baer & Fuller Dry Goods Co. v. American Piano Co.* 127 C. C. A. 639; *Chickering v. Chickering & Sons*, 131 C. C. A. 538; *Knabe Brothers Co. v. American Piano Co.* 143 C. C. A. 325; *Wright Restaurant Co. v. Wright*, 74 Wash. 230. ✓

In the light of these principles the plaintiff has not shown that he is entitled to equitable relief. The only use of the defendant's name that was likely to cause anything more than incidental confusion of the plaintiff's agency with the defendant's, was in the arrangement in the telephone directory, where the words "Burns Detective Agency" preceded the name "William J." Even if this finding were correct, the defendant practised no fraud in the use of its name; it did not attempt by any artifice to deceive the public or induce the plaintiff's patrons to deal with it upon the supposition that they were dealing with the plaintiff, and there was no evidence that the change in the defendant's name or in the telephone directory was made for the purpose of misleading the plaintiff's customers. Although the plaintiff had an office in Boston two years before the defendant entered the field, and was entitled by priority of use to the name "Burns Detective Bureau," there is nothing in the master's report to show (to quote the words of Mr. Justice Holmes in *L. E. Waterman Co. v. Modern Pen Co. supra*) that "the profit of the confusion is known to and, if that be material, is intended by" the defendant. In fact, the master finds specifically that the defendant did not secure the change in the listing in the telephone directory for the purpose of deceiving the plaintiff's patrons.

There was no evidence that the defendant had a place of business in Boston prior to January, 1911; but William J. Burns then had a national, and to some extent an international, reputation as a detective and we must assume in the absence of evidence to the contrary that the defendant did not intrude itself into the plaintiff's field to trade on his reputation in order to deprive him of his business, or to deceive his patrons. There being no evidence of any attempt by the defendant to hold itself out as the plaintiff or appropriate his business, the likelihood that the mere alphabetical arrangement in the telephone directory would mislead is not a sufficient reason why an injunction should issue. The arrangement was not of such a character as to impose upon the public or on the ordinary observer, when using such reasonable observation and attention as is to be expected. "Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth. . . . A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. . . . Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary observer." *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, *supra*, at page 140. In consulting a telephone directory the names of more than one person of the same surname, who are members of the same profession or engaged in similar kinds of business, are not infrequently found, and the fact that one name first catches the eye does not ordinarily excuse further attention. Some degree of discrimination must be used in seeking information from such a source, if mistakes are to be prevented, and with ordinary discrimination it could easily have been discovered that the Burns Detective Agency conducted by the William J. Burns Company was not the Burns Detective Bureau carried on by Robert Burns.

We are unable to distinguish the case at bar from *International Trust Co. v. International Loan & Trust Co.* 153 Mass. 271, 277, 278, where it is stated that the "International Loan and Trust Company of Kansas City, Mo." could not be, as a matter of law, mistaken by rational people for the "International Trust Company": "It is not sufficient that some person might possibly be misled, but the similarity must be such that 'any person, with such reasonable care and observation as the public generally are

capable of using and may be expected to exercise, would mistake the one for the other.'"

There was some evidence tending to show a slight diversion of business, but one seems to have gained and lost nearly as much as the other, and what confusion there was in the mail was shown to be trifling and could hardly be said to have been occasioned by the listing in the telephone book. From the facts reported, we see no reason why an injunction should issue.

Bill dismissed.

JENNIE M. MALHOIT vs. JOHN F. BURNS.

Worcester. March 29, 1920. — May 18, 1920.

Present: RUGG, C. J., CROSBY, PIERCE, CARROLL, & JENNEY, JJ.

Intoxicating Liquors. Infant.

In an action to recover the penalty prescribed in R. L. c. 100, § 62, for allowing the plaintiff's minor son to loiter upon premises where intoxicating liquor was sold, evidence that the son had been served with intoxicating liquor in a saloon conducted by the defendant, and, when served with the liquor, generally had stayed there "about two hours or two and one half hours," was held sufficient to warrant a finding that the plaintiff's son was allowed by the defendant to loiter on the premises and to entitle the plaintiff to recover the penalty prescribed in R. L. c. 100, § 62.

R. L. c. 100, § 62, creates three separate and distinct causes of action.

In an action to recover penalties prescribed in R. L. c. 100, § 62, recovery on a count alleging a sale of intoxicating liquor to a minor on a certain date does not bar recovery on another count which alleges that on the same date the minor was permitted to loiter on the premises where the sale was made.

TORT, with a declaration in eight counts, to recover penalties provided by R. L. c. 100, § 62. The first four counts alleged respectively sales of intoxicating liquor by the defendant or his agent or servant to the plaintiff's minor son on June 22, 24, 26, and July 1. The last four counts alleged respectively that on those dates the defendant or his agent or servant permitted the plaintiff's minor son to loiter upon the defendant's premises where sales of intoxicating liquor were being made. Writ in the Second District Court of Southern Worcester dated December 9, 1916.

On appeal to the Superior Court, the case was tried before *Hammond, J.* The material evidence is described in the opinion. The judge refused, at the close of the evidence, to direct a verdict for the defendant on counts 5, 6, 7 and 8. The jury returned a verdict of \$600 for the plaintiff upon three counts by reason of sales to her son on June 22, 24, 26, and upon three other counts because the defendant permitted the son to loiter on his premises on those dates, and found for the defendant on both the counts which alleged offences on July 1. The defendant alleged exceptions.

The material portion of R. L. c. 100, § 62, reads as follows:

"Whoever, himself or by his agent or servant, sells or gives intoxicating liquors to a minor, either for his own use, the use of his parent or of any other person, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor in an action of tort."

The case was submitted on briefs.

S. B. Taft, A. H. Bullock & J. M. Thayer, for the defendant.

F. W. Morrison, for the plaintiff.

CROSBY, J. The plaintiff brings this action to recover the penalties prescribed in R. L. c. 100, § 62, for selling intoxicating liquors to her minor son, and for allowing him to loiter upon the premises where such sales were made. The declaration as amended contains eight counts, — the first four alleging a sale or gift of intoxicating liquor to the minor, and the last four that he was permitted and allowed to loiter upon the premises where such sales were made. The jury found for the plaintiff on all the counts except the fourth and eighth. The defendant excepted to the refusal of the court to order a verdict in his favor on the fifth, sixth, seventh and eighth counts.

The question is, whether the evidence warranted a finding that the minor was allowed to loiter on the defendant's premises where intoxicating liquors were sold, on the twenty-second, twenty-fourth and twenty-sixth days of June, 1916. He testified that he was in the defendant's bar-room on the dates named and that one Poulliot was with him, and that on each occasion he was served with liquor by the defendant and his bartenders. Poulliot testified that he was with the minor on the above dates; that each was

served with liquor; that each paid for liquor so served; and that when they obtained liquor there they generally stayed in the defendant's saloon "about two hours or two and one half hours." This evidence, if believed, warranted a finding that the plaintiff's son was allowed by the defendant to loiter on the premises, and entitled her to recover the prescribed penalty under counts five, six and seven.

The statute creates three causes of action and allows a recovery for a sale of intoxicating liquor to a minor, for a gift to him of such liquor, and also for allowing him to loiter on the premises where such liquors are sold. They are separate and distinct causes of action. *McNeil v. Collison*, 130 Mass. 167. The finding for the plaintiff under counts one, two and three for sales of liquor on the three dates named did not prevent a recovery on the counts for loitering on the same dates, if there was evidence to show that the minor did so loiter. Whether the defendant could be held liable for allowing the minor to loiter on the premises if the evidence showed that he was there only long enough to be served with a drink of intoxicating liquor, we need not decide, as there was evidence that on each occasion he remained from two to two and one half hours.

The cases of *Kennedy v. Saunders*, 142 Mass. 9, and *Sackett v. Ruder*, 152 Mass. 397, relied on by the defendant, do not support his contention that he cannot be found liable on the counts for loitering. *Kennedy v. Saunders* was an action under Pub. Sts. c. 100, § 25 (R. L. c. 100, § 63), upon a declaration in four counts, two of which alleged a sale or delivery of intoxicating liquor at different times to a person having the habit of drinking such liquor to excess, within twelve months after having been notified not to do so; and the other two counts alleged the defendant permitted such person to loiter upon the premises where such liquors were kept at different times within the same twelve months; it was held that the plaintiff might recover separate damages under each count. *Sackett v. Ruder* also was an action brought under Pub. Sts. c. 100, § 25; the declaration contained various counts for sales of intoxicating liquor on dates specified and during periods including such dates, and also alleged permission to loiter on the defendant's premises; the trial judge instructed the jury: "You must notice that under the counts for

loitering, as under the counts for sales, you are only to allow damages for a particular occasion, — some particular occasion proved other than the occasion when sales were made." These instructions were held to be in accordance with the decision in *Kennedy v. Saunders, supra*, and meant that where as in that case the counts covered periods of time, the plaintiff could recover under each count for sales and for loitering but one award of damages.

Exceptions overruled.

COMMONWEALTH vs. FRANCISCO FEEL.

Middlesex. March 29, 1920. — May 18, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Homicide. Evidence, Of motive. Practice, Criminal, Exceptions.

Although the Commonwealth is not obliged in any case to prove a motive for the committing of the crime of murder, evidence tending to show a motive always is competent because, if clearly shown, it may help to confirm the conclusion, reached upon all the other evidence, that the accused committed the crime charged.

At the trial of an indictment for murder, there was evidence tending to show that the deceased was employed in the reclamation department of a railroad corporation and lived alone in a small house on a country road in a sparsely settled district; that near his house there was a path, which crossed wooded land near a swamp to railroad tracks and which the deceased frequently used to go to and from his work; that a companion of the defendant, also indicted for the same murder, owned a house near that of the deceased on the same country road and that a path ran from near his house and joined that running by the swamp to the railroad; that the defendant and his companion had been employed in building a culvert near the reclamation department of the railroad corporation; that two days before the murder the defendant and his companion went with a junk dealer by way of the path by the swamp and another path to a hole in the swamp where they exhibited to him a lot of brass journal boxes which they sought to have him purchase. The Commonwealth, subject to exceptions by the defendant, was permitted to introduce testimony of the foreman under whom the deceased had worked, that on the day when the defendant interviewed the junk dealer the deceased and the foreman had a conversation in consequence of which they went from the railroad tracks up the path toward the house of the deceased; that they had gone about forty feet along the path when the foreman saw the defendant with a shotgun in his hand cross the path ahead of him; that he waved his hand to the defendant and shouted to him; that the defendant saw them and ran away; that the deceased led the foreman to the hole in

the swamp, where the foreman saw a large quantity of brass junk which he identified by marks as property of the railroad corporation, and that previous to that date brass junk wrongfully had been taken from the corporation. The deceased was killed two days later by revolver shots and knife wounds. There was other evidence that the defendant committed the deed. *Held*, that

(1) The testimony that the deceased and the foreman had a conversation merely referred to a relevant fact and was competent;

(2) The further testimony of the foreman was competent as tending to show that the secreted brass junk was stolen property;

(3) Taken in connection with the evidence as to the defendant's negotiations with the junk dealer, the testimony of the foreman tended to show that the defendant had stolen the junk and had secreted it;

(4) The testimony of the foreman was admissible as tending to show a motive for the crime.

While a defendant indicted for a crime is not to be convicted by evidence that he previously had committed other crimes wholly disconnected with that charged and such evidence should be excluded, yet, if it be shown that the defendant has committed other crimes, the proof of which has a tendency to establish the commission of the crime charged, evidence of the commission of the earlier crimes is admissible.

The bill of exceptions saved by the defendant at the trial above described recited that the trial judge instructed the jury fully as to the law upon the main issues presented, to which no exception was taken. The charge contained no reference to the alleged larceny of brass. The defendant did not make any request that an instruction should be given on that subject, did not call the judge's attention to the omission of the subject from the charge, and saved no exception on the subject. *Held*, that it was not open to the defendant to contend in this court that the omission of instructions on the subject of the larceny of the brass was error entitling him to a new trial.

Instructions which permitted a jury to find that one, who had committed a homicide, was guilty of murder in the first degree because the homicide was committed with extreme atrocity and cruelty are warranted where there was evidence tending to show that the defendant either alone or assisted by others committed the homicide by stabbing and cutting the deceased in twenty places and by shooting him in the head three times.

A request, made for the first time at the close of the charge to the jury at the trial of an indictment for murder, for an instruction based on facts of which there was no evidence at the trial, properly may be refused.

INDICTMENT, found and returned on November 8, 1918, charging that the defendant on October 31, 1918, at Billerica "did assault and beat Louis Fred Soulia, with intent to kill and murder him, and by such assault and beating, did kill and murder said Louis Fred Soulia."

Other indictments charging the same offence were found and returned against Joseph Cordio and Luigi Feci. The indictments against Francisco Feci and Cordio were tried together before *Dubuque, J.* The material evidence and exceptions saved by

Francisco Feci are described in the opinion. Cordio was found not guilty. Francisco Feci was found guilty of murder in the first degree, and alleged exceptions.

The case was submitted on briefs.

M. J. Sawyer & P. Mansfield, for the defendant.

N. A. Tufts, District Attorney, & *H. A. Wagner*, Assistant District Attorney, for the Commonwealth.

CROSBY, J. The defendant was indicted for the murder of Louis Fred Soulia at Billerica on October 31, 1918. Other indictments for the same offence were returned against Joseph Cordio and Luigi Feci. The indictments against Francisco Feci and Cordio were tried together. The jury returned a verdict of guilty of murder in the first degree against the defendant Francisco Feci (who will hereafter be referred to as the defendant), and of not guilty against Cordio; Luigi Feci, the third defendant, having absconded and not having been apprehended, was not tried.

The evidence introduced by the Commonwealth tended to show that Soulia, the deceased, lived alone in a small house on a country road in a sparsely settled district, and was employed by the Boston and Maine Railroad in its scrap reclamation department; that near his house there was a path crossing a tract of land covered with scrub trees and undergrowth and leading past a swampy place to the main line tracks of the railroad, after crossing which a person could go to the car shops over land of the railroad corporation; that Soulia frequently used this path in going to and from his work; that Cordio owned a house not far from that of Soulia on the same road; that a path from near Cordio's house joined the one above described; that for some time before the alleged murder, Cordio and the Fecis (the latter being brothers) had been employed by a contractor in making a culvert on land of the railroad corporation near the reclamation department; that during the time the defendants were working on the culvert there were thefts of brass journal boxes and other junk from the reclamation department; that on the morning of Tuesday, October 29, 1918, between six and seven o'clock, one Perkins, a junk dealer, went with Cordio, the defendant and another man, from Cordio's house down the path joining the one leading to the railroad tracks, and down that to a side path which led to a hole dug

in the edge of the swamp not far distant from the tracks; that the three men showed Perkins a lot of brass journal boxes and asked him to buy them; that he refused and they all went away; that at about nine o'clock on the same morning Soulia and one Brown (foreman of the reclamation department) in consequence of a conversation between them, walked from the car shops to the railroad tracks and started to go up the path to Soulia's house; that when they were about forty feet from the tracks along the path, Brown saw the defendant cross the path ahead of him with a shotgun in his hand; that Brown shouted to him and waved his hand; that the defendant looked at them and then ran away; that Soulia led Brown to a side path near where the defendant had appeared, and they went down it a short distance and came to a hole dug in the edge of the swamp in which Brown saw a large quantity of brass junk, which he identified as being the property of the railroad corporation; that on the following Thursday afternoon Soulia finished his work in the car shops at twenty minutes before six; that at about seven o'clock that night shots and screams were heard coming from the direction of the path above described; that Soulia did not report for work thereafter, and on the following Monday search was made and a pool of blood was found near a bush beside the path; that leading from the pool of blood were marks such as could be made by dragging a heavy body; that some distance from the pool of blood the hat, dinner pail and spectacles of Soulia were found buried in a shallow hole; that still further along the marks apparently made by dragging something over the ground, the dead body of Soulia was found buried in a shallow grave; that there were footprints in the sand near the grave, into one of which a bloody shoe taken from the defendant at the time of his arrest exactly fitted; that under the piazza of the house where the defendant lived was found a shovel with sand on it like that at the grave, and, in a swampy place back of Cordio's barn, an axe and a piece of rope, said to have blood stains on them; that there were ashes on the grate of the stove in the house, containing metal buttons and ashes that had been clothing; that there were three bullet wounds in Soulia's head, all of which entered his right eye socket; that two of the bullets were extracted from his skull and were of the same calibre as those found in a loaded revolver taken from a coat belonging to the

defendant just before his arrest (although he testified that the coat and revolver belonged to his brother Luigi); that the other bullet was not found; that the revolver contained six chambers; that in three of them there was an accumulation of grease and dirt but no cartridges; that there was no grease or dirt in the other three chambers, which were successive in the order of rotation of the cylinder; that the bullets found in the body of Soulia at the autopsy were of a calibre, size and manufacture adapted to and capable of being fired from the revolver.

There was further evidence tending to show that the defendant killed the deceased; also, evidence that there were about twenty incised wounds or cuts on different parts of the body of the deceased of various sizes and depths, and nothing about them taken as a whole was consistent with their having been self-inflicted; that death was the result of all the wounds, — no one of them alone would have been immediately fatal; and that death was caused by loss of blood and did not instantaneously follow any one wound.

1. The defendant excepted to the admission in evidence of the testimony of Brown (1) that he had a talk at the car shop with Soulia on the morning of October 29; (2) that in consequence of that talk he and Soulia went to the path and saw the defendant, and the brass in the hole, as previously described; (3) that he (Brown) recognized on the brass castings certain identification marks showing that they were the property of the railroad corporation; and (4) that before that date brass junk had been wrongfully taken from the railroad corporation from time to time.

It was the contention of the Commonwealth that the deceased was murdered either for revenge because of his having revealed the hiding place of the stolen junk and the connection of the defendant and Cordio therewith, or for the purpose of removing a probable witness against them in the event of their being prosecuted for stealing the property or concealing it, or for both such reasons. When this evidence was offered, the district attorney stated in the presence and hearing of the jury that it was offered for the purpose of showing a motive for the crime on the part of the defendant.

Although motive is no part of the offence charged and the Com-

monwealth is not obliged in any case to prove a motive for murder, yet evidence tending to show a motive is always competent because, if clearly shown, it may help to confirm the conclusion reached from all the other evidence that the accused has committed the offence charged. *Commonwealth v. Abbott*, 130 Mass. 472. *Commonwealth v. Howard*, 205 Mass. 128. *Commonwealth v. Rivet*, 205 Mass. 464. *Commonwealth v. Richmond*, 207 Mass. 240.

The evidence that Brown had a conversation with the deceased, referred to a fact and was clearly competent; the conversation itself was neither asked for nor given, therefore the rule against the admission of hearsay evidence was not violated. *Commonwealth v. Moulton*, 4 Gray, 39. *Sampson v. Sampson*, 223 Mass. 451, 459. The evidence that in consequence of the conversation Brown and Soulia went to the path and saw the defendant and observed the brass in the hole, that Brown recognized the property as that of the railroad corporation, and that brass junk had been wrongfully taken therefrom at different times, all was competent and material as having a tendency to show that the brass so secreted was stolen property. A man is not to be convicted of a criminal offence by evidence that he has previously committed other crimes wholly disconnected with that for which he is placed on trial, and such evidence must be excluded; yet if it be shown that the defendant has committed other offences, the commission of which has a tendency to establish the fact in controversy, such evidence is plainly admissible. *Commonwealth v. Shepard*, 1 Allen, 575. *Commonwealth v. Choate*, 105 Mass. 451, 458. *Commonwealth v. Jackson*, 132 Mass. 16. *Commonwealth v. Johnson*, 199 Mass. 55, 59. *Commonwealth v. Dow*, 217 Mass. 473, 480. *People v. Sharp*, 107 N. Y. 427, 476. *Moore v. United States*, 150 U. S. 57. The defendant contends that there was nothing to show that the brass castings were stolen by him or that he received them knowing them to have been stolen, or that he had any knowledge that he was suspected of either offence. The evidence that the property had been stolen and concealed, that the defendant was seen in the vicinity of the place where it was hidden, of the attempt by him with others to sell it to Perkins, that when Brown and the deceased were in the vicinity where the property was hidden the defendant was seen and ran away when Brown

shouted to him, together with the other evidence, well warranted a finding that he either alone or with others was guilty of the larceny of the property or participated in its concealment, knowing it to have been stolen; accordingly the evidence was competent upon the question of motive. *Commonwealth v. McGorty*, 114 Mass. 299. *Commonwealth v. Kronick*, 196 Mass. 286.

2. The record recites that the presiding judge instructed the jury fully as to the law upon the main issues presented, to which no exception was taken. The charge contained no reference to the alleged larceny of brass claimed to have been the property of the railroad corporation.

No exception to the charge in this respect was saved; nor did the defendant at any time either before or after the charge make any request that the evidence referring to the larceny or concealment of the brass should be limited to the question of motive, and no exception is before us because of the omission to give such instruction.

In *Commonwealth v. Hassan*, 235 Mass. 26, it was said: "It is obviously reasonable that requests for instructions, if they are to be an aid in the administration of justice in the trial both of criminal and civil cases, ought to be presented before the arguments. . . . The assumption may be indulged that the salient points of the case will be adequately covered by the charge: but if at its close, substantial omissions or errors are observed, the attention of the judge may be drawn to them, and upon refusal or neglect to give correct and adequate instructions upon important factors in the case, the right to exceptions thus adequately protects the rights of parties. *Brick v. Bosworth*, 162 Mass. 334."

The general rule that requests for instructions or for rulings in trials, both in criminal and civil cases, shall be made in writing before the closing arguments is well established, and has long been in force in this Commonwealth independent of any formal rule to that effect. It is equally well settled that to entitle a party to object to an error or omission in the charge of the presiding judge such objection shall be based on an exception for failure to give a request seasonably made, or upon failure to correct such omission or error upon request made at the conclusion of the charge. This cardinal rule applies with equal force in civil and criminal proceedings and is deemed to be the safest method of determining

the truth of any question of fact presented. It is a reasonable rule necessary for the protection of the interests of the defendant and of the Commonwealth that a criminal trial should be conducted in accordance with definite and established rules of practice; if a defendant were permitted to remain silent until the jury had returned their verdict, and then to object to the charge for the first time in this court, it would lead to great abuse and have a tendency to hamper the correct and proper administration of justice.

In *Commonwealth v. Kneeland*, 20 Pick. 206, at pages 222 and 223, the rule is thus stated: "It is the duty of the judge to give such instructions to the jury in matters of law, as in his judgment may be best calculated to aid and assist them in forming their verdict. But he is not bound to give instructions, upon any particular questions, unless his attention is called to them, and they are particularly requested, in which case, if pertinent, instructions will be given, and if the judge thinks proper, he will reserve the question of their correctness." *Howe v. Ray*, 113 Mass. 88.

In *Commonwealth v. Wunsch*, 129 Mass. 477, the jury returned a verdict of guilty and the defendant alleged exceptions, contending that, while certain evidence admitted at the trial was competent for a certain purpose, it was incompetent for other purposes; and it was held that as the evidence was competent for some purposes, the defendant not having asked for instructions limiting its effect, no ground of exception was shown.

In *Higlister v. French*, 180 Mass. 299, the action was for malicious prosecution and slander. Certain evidence was admitted to show that the complaint on which the plaintiff was prosecuted was instituted by the defendant out of motives of revenge; the latter contended that the evidence should have been limited and that not having been so limited she was prejudiced; and it was held that if the defendant had any fears that the evidence would be so used, she should have requested the court to instruct the jury as to the purpose for which the evidence was competent.

The defendant in *Commonwealth v. Rivet*, *supra*, was convicted of murder in the first degree. The Commonwealth offered evidence to show that the motive of the defendant in the commission of the crime was his intention to collect the amount of a policy of insurance on the life of the deceased, pledged to the

defendant as security for a debt owed to him by the deceased. While the evidence was competent only upon the question of motive, this court said, at page 466: "If the defendant had wished to have the jury instructed that the evidence was admissible only for the limited purpose for which it was competent, he should have asked for such an instruction. *Howe v. Ray*, 113 Mass. 88."

In *Commonwealth v. Terregno*, 234 Mass. 56, the defendant was convicted of murder in the first degree. He was prosecuted with one Maria Cammerota, wife of the deceased; she was convicted of manslaughter. Her counsel in his closing argument to the jury referred to Terregno in terms which might have been found to have been prejudicial to him, and although his counsel objected to this portion of the argument, he did not save any exception thereto; it was held that as no exception was taken, the question was not presented by the record.

In *Commonwealth v. Shepard*, 1 Allen, 575, the defendant was charged with embezzlement, and evidence of an earlier like offence committed by him was admitted for the purpose of proving a guilty intent in the commission of the previous act. After a verdict of guilty, the presiding judge reported the case to this court (Gen. Sts. c. 173, § 8) for the determination of the question whether the evidence introduced was sufficient to authorize the verdict. The failure to limit the evidence as to its legitimate effect by instructions to the jury was held to be sufficient ground for a new trial. The report so made to this court presented only questions of law. *Commonwealth v. Brynes*, 126 Mass. 248. *Electric Welding Co. Ltd. v. Prince*, 200 Mass. 386, 391, 392. The report showed that no specific instructions were given respecting the purpose for which the evidence above referred to was admitted; in these circumstances the question whether such instructions should have been given was properly before the court to the same extent as if it had been raised by exception to the refusal of the trial judge to give the instructions. It is plain that the decision in that case does not support the defendant's contention. *Commonwealth v. Jackson*, *supra*, cited by the defendant, is plainly distinguishable from the case at bar.

While in some jurisdictions it is held to be reversible error for the presiding judge in a criminal case, even if not requested and although no exceptions are taken, to fail fully to instruct the

jury upon every question of law legitimately raised by the evidence and material to a decision of the case, such is not the rule in this Commonwealth. See *People v. Becker*, 210 N. Y. 274, 285. See also cases collected in 16 C. J. 1056, notes 15, 16, 17.

3. At the close of the charge the defendant excepted to so much of the instructions as allowed the jury to find a verdict of murder in the first degree on the ground that it was committed with extreme atrocity and cruelty. R. L. c. 207, § 1. If, as the jury were warranted in finding upon the direct and circumstantial evidence the defendant either alone or assisted by others killed the deceased by stabbing and wounding him in many parts of his body, and by shooting him, it could not be ruled that the crime was not committed with extreme atrocity and cruelty; manifestly it was a question of fact properly left to the jury upon full and adequate instructions to determine whether the deceased was killed by the defendant, and if they so found, whether the crime was committed with such savagery and brutality as to constitute murder committed with extreme atrocity and cruelty. *Commonwealth v. Desmarteau*, 16 Gray, 1. *Commonwealth v. Devlin*, 126 Mass. 253.

4. At the close of the charge the defendant's counsel stated: "I would like to ask the court to suggest to the jury that there is a third person in this case, who had planned this, and that the defendant Feci said that as soon as he heard the shots he ran away; therefore he couldn't be charged with the crime of murder, and a verdict of guilty in the first degree couldn't be brought in against him." If this is to be treated as a request for a ruling of law, it is plain that it could not properly have been given; there was no evidence as to the person who planned the murder, and while the defendant had said that he ran away as soon as he heard the shots fired, the jury were not obliged to believe this testimony; accordingly they could not properly have been instructed that the defendant could not be found guilty of murder in the first degree. If the request is to be considered as a request to call attention to the evidence referred to, no exception lies, as the judge was not required to refer to fragmentary parts of the evidence; the case was for the jury on all the evidence. *Jaquith v. Rogers*, 179 Mass. 192, 197. *Commonwealth v. Johnson*, 188 Mass. 382, 387.

We have examined and considered all the questions raised by the record and find no error of law in the conduct of the trial.

Exceptions overruled.

H. P. HOOD & SONS vs. COMMONWEALTH.

Suffolk. January 16, 1920. — May 19, 1920.

Present: RUGG, C. J., BRALEY, DE COURCY, & JENNEY, JJ.

Tax, On income of foreign corporation. Corporation, Foreign. Constitutional Law, Taxation of income of foreign corporation, Interstate commerce. Interstate Commerce.

The principal business of a corporation, organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, was the buying of milk from farmers, transporting it to Boston and there selling it by daily deliveries to retail dealers and consumers. About ninety per cent of such milk was purchased in States other than Massachusetts. The milk in the great majority of instances was delivered by the farmers to the employee at the train or to the corporation's milk station, whence it was shipped daily by railroad to Boston in cans of the corporation, which paid the freight charges. At Boston the milk was removed from the cans, pasteurized, put into other cans or bottles and distributed, chiefly by vehicles of the corporation, to its customers or to its own retail stores. The corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts. Upon a bill in equity by the corporation seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, it was *held*, that

(1) By the provisions of § 3 of the statute, income derived by the corporation from sales of milk and other articles either outside of Massachusetts or by direct shipment from outside of Massachusetts to its customers within the Commonwealth was not subject to taxation;

(2) The corporation ceased to be engaged in interstate commerce as to the milk when, after its arrival in Boston, it changed the method of dealing with and disposing of it;

(3) The transactions with the milk after its arrival in Boston were domestic transactions, and net income derived therefrom was subject to the tax imposed by the statute;

(4) The statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 4, 1919, under St. 1918, c. 253, § 4; c. 255, § 7, for the abatement of a tax assessed upon the plaintiff's income for the year ending January 31, 1918.

The suit was heard by *Carroll, J.*, upon an agreed statement of facts. Material facts are stated in the opinion. By order of the single justice, a final decree was entered dismissing the bill. The plaintiff appealed.

Material portions of St. 1918, c. 253, are as follows:

"Section 1. Every foreign corporation, as defined in section thirty-nine of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine, shall pay a tax to the Commonwealth computed upon the net income for its fiscal or calendar year next preceding, as hereinafter provided, upon which income such corporation is required to pay a tax to the United States. Each corporation subject to the tax imposed by this act shall render to the tax commissioner, under oath or affirmation of its treasurer or assistant treasurer, on or before the first day of July in the year nineteen hundred and eighteen, unless the fiscal year of the corporation for which it made return to the collector of internal revenue ended between the thirtieth day of April and the first day of July, both inclusive, in which case the said report shall be rendered by the corporation within sixty days after the date of the closing of its said fiscal year, a true copy of the last return made to the collector of internal revenue, of the annual net income arising or accruing from all sources in its fiscal or calendar year next preceding, stating the name and situation of the principal place of business of the corporation; the kind of business transacted, and a list of all subsidiary companies, if any, with the situation of the principal place of business of each; the gross amount of its income during the said year from all sources, and the amount of its ordinary necessary expenses paid out of earnings in the maintenance and operation of the business and properties of the corporation; such other information as may be requested by the United States treasury department for the purpose of ascertaining the total amount of net income taxable under the United States income tax act; the net income of the corporation after making the deductions authorized; the amount of taxes paid upon its income to the internal revenue department for the year next preceding the one for which such return is made. . . .

"Section 3. If any such corporation carries on business outside of this Commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign

commerce, that portion only of its net income which is not derived from the said sources shall be apportioned to this Commonwealth and taxed hereunder. Each corporation, in connection with the return required by section one of this act, shall state in such form as the tax commissioner shall prescribe what portion or amount of its annual net income is apportionable to this Commonwealth, as provided in this section. A tax is hereby laid on every such corporation of one per cent of the said income to be assessed in the manner hereinafter provided. . . .

"Section 5. The tax imposed by this act shall be construed as a temporary emergency tax levied in addition to all other taxes imposed on foreign corporations, and not to any extent as a part of the system of taxation established by sections fifty-four to fifty-six, inclusive, of Part III of chapter four hundred and ninety of the acts of nineteen hundred and nine and acts in amendment thereof or in addition thereto."

A. Lincoln, for the plaintiff.

W. H. Hitchcock, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. This is a bill in equity for the abatement of a tax assessed under St. 1918, c. 253. It is brought under St. 1918, c. 255, § 7, which is made applicable to taxes imposed under said c. 253, by § 4 thereof.

The plaintiff is a corporation organized under the laws of the State of Maine and having a usual place of business in Boston within this Commonwealth. Its principal business is the buying of milk in the country from farmers who make daily deliveries, the transportation of that milk to Boston and the sale of most of it there by daily deliveries to regular customers, who are either consumers or retail dealers. About ninety per cent of the milk so purchased originates in New York and in New England States other than Massachusetts. "In the great majority of instances the farmer delivers the milk either to the employee at the train which transports it to Boston" or to the plaintiff's milk station near the railroad station. The milk is shipped in cans belonging to the plaintiff, by whom the freight charges are paid, and is carried by railroad day after day on the same train. At Boston the milk is removed from the cans, pasteurized, put in other cans or bottles, and distributed forthwith

to its customers, chiefly from the plaintiff's wagons, or to retail milk dealers or through its own retail stores. The plaintiff, as incidental to its main business, also manufactures and sells other milk products both inside and outside of Massachusetts, and sells other dairy products. The amount of the net income of the plaintiff for the period in question, derived from sales of milk and other articles either outside of Massachusetts or by direct shipment to its customers inside the Commonwealth from outside its limits, is approximately fifteen and seven tenths per cent of its total net income. Confessedly this part of its income is not subject to the tax.

It is not contended that the method by which the tax was assessed was correct. Any error in this particular is said to have been due to insufficient information furnished to the tax commissioner by the plaintiff. But, however that may be, no controversy is made concerning the method of assessment, because it is agreed that if the plaintiff is made liable by St. 1918, c. 253, to a tax on the remaining portion of its net income after deducting said fifteen and seven tenths per cent, the bill is to be dismissed. Therefore, it must be assumed that the tax actually levied is at least not in excess of the amount justly due if the plaintiff is liable to taxation for the net income derived from that portion of its business which ends in selling from its stock in Massachusetts to customers receiving deliveries in Massachusetts, excluding all net income derived from sales outside Massachusetts and within Massachusetts by direct shipment to customers from other States.

The plaintiff contends that its income on which the tax is levied was derived from interstate commerce and hence is not taxable under the statute.

The title of St. 1918, c. 253, is "An Act imposing an additional tax upon the net incomes of foreign corporations." It is provided by § 5 that the tax "shall be construed as a temporary emergency tax levied in addition to all other taxes imposed on foreign corporations, and not to any extent as a part of the system of taxation established by sections fifty-four to fifty-six, inclusive, of Part III" of the general tax act providing for an excise measured by authorized capital but limited to \$2,000. The excise imposed by these last sections is not here involved. See *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147; *Lawton Spinning Co. v.*

Commonwealth, 232 Mass. 28. The present statute requires that every foreign corporation shall pay a tax on the net income for its next preceding fiscal or calendar year "upon which income such corporation is required to pay a tax to the United States." By § 3 it is provided that "If any such corporation carries on business outside of this Commonwealth, or owns property beyond its jurisdiction, or is to any extent engaged in interstate or foreign commerce, that portion only of its net income which is not derived from the said sources shall be apportioned to this Commonwealth and taxed hereunder."

The present tax is not discriminatory against foreign corporations. An additional tax on domestic corporations quite as onerous in its terms was imposed by St. 1918, c. 255, taking effect on the same day as the statute here in question. See *American Printing Co. v. Commonwealth*, 231 Mass. 237.

The statute in imposing the additional tax expressly exempts from its scope interstate commerce and property outside the Commonwealth. It avoids the provisions which caused the statute under review in *International Paper Co. v. Massachusetts*, 246 U. S. 135, to be stricken down. It is indubitable that that part of the plaintiff's business which consists of transporting the milk bought outside this Commonwealth to Boston is interstate commerce. Interstate commerce comes to an end, however, when the milk thus transported in interstate commerce is delivered in Boston. The plaintiff then undertakes a new and distinct method of dealing with the milk, utterly different from interstate commerce. It removes the milk from the cans in which it has been the subject of interstate commerce and makes it a part of the common stock of merchandise within this Commonwealth. It then pasteurizes the milk, which is a subjection of it to heat for the purpose of inducing certain chemical changes. See *Commonwealth v. Boston White Cross Milk Co.* 209 Mass. 30. That process closely resembles manufacture as that word is applied to fabricated articles. It then puts the milk into other receptacles for purposes of sale and sells and delivers it chiefly from its own wagons or stores to retail customers and also to other retail dealers in or near Boston. The net income is derived wholly, so far as measured in cash receipts, from these retail or wholesale sales from the stock, which previously has become a part of the com-

mon stock of merchandise within the Commonwealth. Interstate commerce has been utilized as a preliminary. The part it played ended when the milk reached its terminus at Boston. Thereafter every step in the transaction was an intrastate affair. These sales were not interstate commerce. They are as clearly domestic transactions as are sales by grocers or by any other retail dealers from local stocks of goods. The dealing with the milk after arrival in Boston stands on the same footing as do the sales by the plaintiff of eggs, dairy products and canned goods. In principle this business of the plaintiff is indistinguishable from the sales by any other retail or wholesale dealer who sells from a stock of goods bought in a foreign market, and brought to his store here by interstate commerce. The exemption of the statute does not extend to the net income here taxed simply because at a preliminary stage the milk (subsequently mingled with the common bulk of property within the Commonwealth, pasteurized, re-bottled and sold here at retail) was brought into the Commonwealth by interstate commerce. If such transportation in interstate commerce affords immunity from taxation in whole or in part to the plaintiff, there appears to be no sound principle which would prevent the same immunity from attaching to every domestic retail dealer in respect of goods which in any stage between the constituent raw material and the finished product have been transported in interstate commerce.

The case at bar upon this point is indistinguishable from numerous decisions. *United States v. E. C. Knight Co.* 156 U. S. 1. *Cornell v. Coyne*, 192 U. S. 418. *Bacon v. Illinois*, 227 U. S. 504, and cases there cited. *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147. *Arkadelphia Milling Co. v. St. Louis Southwestern Railway*, 249 U. S. 134. *Wagner v. Covington*, 251 U. S. 95. *Marconi Wireless Telegraph Co. of America v. Commonwealth*, 218 Mass. 558. As matter of statutory interpretation the net profits here taxed were within the terms of the taxing act and not within its exception.

The statute as thus construed violates no right secured to the plaintiff by the Federal Constitution. It does not impose a direct burden upon interstate commerce. The case upon this point appears to be within the authority of *United States Glue Co. v. Oak Creek*, 247 U. S. 321. In that case a general tax was laid

under the law of the State of Wisconsin upon the net income of a domestic corporation. It was attacked as an unlawful burden on interstate commerce on the ground that such income was derived in part from sales made to customers outside the State of goods manufactured by the corporation within the State and shipped either directly to such customers or indirectly through its branches in other States, and therefore that such income was derived from interstate commerce. It there was said at pages 326, 328, 329: "It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. . . . The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, we held that a State tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in *Peck & Co. v. Lowe*, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. I, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. . . . Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrim-

ination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." In our opinion there is no distinction respecting a tax on net income in its bearing upon interstate commerce between the principles thus declared and those rightly applicable to the plaintiff upon the facts here disclosed, although it is a foreign corporation.

The contention that there is any valid distinction in this particular between a foreign and domestic corporation appears to us to be disposed of adversely to the contention of the plaintiff by *Shaffer v. Carter*, 252 U. S. 37, 57, decided since the argument of the case at bar. In that case a tax was imposed upon the net income of a non-resident individual derived from conducting business within the State of Oklahoma. It there was said: "It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321." No rational line of demarcation can be drawn in this particular in our opinion between a non-resident individual and a foreign corporation.

Decree dismissing bill affirmed with costs.

offered by the defendant and excluded by the judge, and exceptions saved by the defendant are described in the opinion.

The judge ordered a verdict for the plaintiff in the sum of \$4,922.74; and at the request of the parties reported the action to this court for determination, judgment to be entered for the plaintiff if his rulings were right, and, otherwise, a new trial to be ordered.

C. P. Curtis, Jr., for the plaintiff.

A. A. Wyman, for the defendant.

CARROLL, J. The plaintiff seeks to recover on three contracts in writing for the sale of advertising space in electric cars. The defendant contends that the contracts were not approved by the plaintiff's president or treasurer, as required by the contracts, and that the defendant was induced to execute them because of an oral promise by the plaintiff's agent "that although the plaintiff would not insert such a clause [a clause providing for the cancellation of the contract] in writing in the contract the defendant would have the right to cancel such contract at any time it found such car advertising unprofitable, on giving thirty (30) days' notice to the plaintiff of such cancellation;" that such representations were made with the purpose of defrauding the defendant, and that it was not intended by the plaintiff's agent to carry out these representations.

The written contracts included all the terms of the understanding and were executed in substantial compliance with their requirements. Each contract contained the following provision: "This contract is not binding unless approved by the President or Treasurer of the Eastern Advertising Company." Two of the contracts were signed "The E. L. Patch Co., by E. L. Patch," and one by "The E. L. Patch Co. . . . by R. R. Patch," and they were "Approved Eastern Advertising Co. By Clinton Elliott, Treas."

Because the contracts were approved in this manner, it cannot be said that they were not approved by the president or treasurer as stipulated in the written agreement. In *Clarke v. Fall River*, 219 Mass. 580, 583, the contract was executed in the name of the city by the mayor and bore the indorsement of no other city official or board. The defendant's charter required the approval of the mayor in writing. It was said in the opinion: "It would be

sacrificing substance to form to say that, after the mayor had manifested his direct affirmative sanction (*McLean v. Mayor of Holyoke*, 216 Mass. 62, 65) to every stipulation of the contract by executing it in behalf of the defendant, he must go through the idle ceremony of signing a nominal approval of it." The principle of that case governs the case at bar. When the contract was executed by the plaintiff in the name of its treasurer, it was approved by him, and the signature "Eastern Advertising Co. By Clinton Elliott, Treas." was in fact the signature of the company. See *Arcade Malleable Iron Co. v. Jenks*, 229 Mass. 95, 101.

The defendant offered to show that the plaintiff's agent made the representations, set out in the defendant's answer, for the purpose of defrauding the defendant; that he did not intend when they were made to carry them out; and that he used them as a false pretence to induce the defendant to sign the contract. The evidence was excluded. Each contract, under "Terms and Conditions of This Contract," contained the stipulation, "No verbal conditions made by agents will be recognized. Every condition must be specified on the fact of this contract." The written contracts contain all the stipulations the parties agreed to, and the parol promise given when they were executed could not be added to them. *Carpenter v. Sugden*, 231 Mass. 1. *Bennett v. Thomson*, ante, 463. The condition requiring that all the terms of the contract must appear on the face of the written instrument, and providing that no verbal agreement of the plaintiff's agent would be recognized, were stipulations to which the parties agreed and under which they must be held. If the plaintiff's agent, acting honestly, intending to keep the promise, agreed that the contract could be cancelled by the defendant on thirty days' notice, it is not shown that he had authority to make such an agreement, see *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169; and by the specific terms of the contract such a parol understanding was of no validity. Even if it were known when the promise was made that it would not be fulfilled and was made for the purpose of deceiving the defendant, the express stipulations of the written contract were to govern, and the plaintiff was not to be held by the parol representations of the agent. *Colonial Development Corp. v. Bragdon*, 219 Mass. 170, was an action upon a written contract, one of the terms of which was that no agent of the plaintiff had authority to make any repre-

sentations not contained in the contract. Evidence was offered tending to show that the defendant was induced to sign the contract by reason of false and fraudulent representations of the agent which, apart from the stipulations preventing him from binding the plaintiff, would invalidate any agreement made in reliance upon them. It was held that the defendant could not rely on the statements of the agent and was bound by the agreement as expressed in the written contract. See *International Textbook Co. v. Martin*, 221 Mass. 1, 7. In *Cannon v. Burrell*, 193 Mass. 534, the written contract stated: "Separate verbal or written agreements with salesmen are not binding." The defendant claimed he was induced to enter into the contract by reason of the false representations of the plaintiff's agent. The judge ruled that the question was not open to the defendant or material, in view of the written agreement. It was decided that the defendant entered into the agreement on the basis that the salesman had no authority to change the terms of the written contract by any representation or inducement, and that the ruling of the judge in refusing to pass on the claim of the defendant, that he was induced to enter into the contract by reason of the false representation of the salesman, was right.

As the evidence offered by the defendant was inadmissible and the plaintiff must prevail, it becomes unnecessary to consider whether the statements of the agent relating to what might happen in the future were of such a nature that the defendant could rely upon them as fraudulently made, even if no reference were made in the contract to the "verbal conditions made by agents." See *Knowlton v. Keenan*, 146 Mass. 86; *Dawe v. Morris*, 149 Mass. 188; *Friedman v. Pierce*, 210 Mass. 419; *Brown v. C. A. Pierce & Co.* 229 Mass. 44.

Judgment is to be entered for the plaintiff.

So ordered.

ARTHUR W. WHEELWRIGHT & another, executors, *vs.* TAX
COMMISSIONER.

Suffolk. March 2, 1920. — May 19, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Tax, On income received by executor. *Executor and Administrator. Statute*,
Construction. Constitutional Law, Taxation. Practice, Civil, Costs.

Exemptions from taxation must appear plainly either from the express words of a statute or by necessary intendment from its express words.

The provision of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9.

In the above statutes so construed there is nothing violative of the constitutional rights of executors and administrators.

Upon the denial of an abatement of a tax upon income asked for by an executor by a petition under St. 1916, c. 269, § 20, this court, under St. 1909, c. 490, Part I, § 80, (made applicable to the proceeding by St. 1916, c. 269, § 20,) ordered judgment for the tax commissioner for his expenses and costs, to be taxed by the Superior Court.

PETITION, filed in the Superior Court under St. 1916, c. 269, § 20, by the executors of the will of John W. Wheelwright, late of Westwood, seeking an abatement of a tax upon income assessed to the petitioner under St. 1916, c. 269.

In the Superior Court the petition came on to be heard by *Hammond, J.*, and, the parties agreeing that the petition and the answer stated all material facts, the judge reported the case to this court for determination.

H. Wheeler, for the petitioners.

E. H. Abbot, Jr., Assistant Attorney General, for the respondent.

RUGG, C. J. This is a petition under St. 1916, c. 269, § 20, by the executors of the will of a deceased resident of this Commonwealth for the abatement of a tax. The single question presented is whether the executors of a will who receive income payable to inhabitants of this Commonwealth are entitled, in the assessment

upon them of income taxes, to the same deductions for taxes and expenses paid as are allowed by the income tax law to trustees.

Provision is made by the income tax law, St. 1916, c. 269, for the assessment of taxes upon certain incomes received both by executors or administrators and by trustees. Under the divisional heading of the statute "Estates of Deceased Persons," is § 8, which provides at some length for a tax upon incomes received by "persons since deceased" and by "estates of deceased persons." The last sentence of that section is in these words: "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators." This is followed immediately by the divisional heading "Property Held in Trust," and § 9, wherein provision is made in considerable detail for the taxation of "The income received by estates held in trust by trustees." No specific deductions were allowed in this or in the preceding section, although of course those provided by the general terms of § 3 were applicable. An amendment of § 9 was made by St. 1918, c. 207, whereby several clauses were inserted to the effect that "In the computation of the tax the trustee," in addition to deductions previously allowed under § 3, "shall be entitled to the following deductions from income taxable under sections two, five (a) and five (c) of this act, respectively, before the taxable income of the beneficiary or beneficiaries shall finally be determined." Then follows an enumeration of four different kinds of permissible deductions.

The form of St. 1918, c. 207, is that the original § 9 "is hereby amended by inserting" at places identified by lines and preceding word, the specified words, "so as to read as follows:—" There then is printed the full § 9 as it stands in its amended form. The effect of this phraseology is that the original § 9 has become a thing of the past, valuable only as matter of history and has been superseded by the new § 9. Other statutory provisions relating to the old and not inconsistent with the new section are applicable to the latter. *Fitzgerald v. Lewis*, 164 Mass. 495. *Merrill v. Paige*, 229 Mass. 511. The statute now is to be treated and interpreted as if the new § 9 had been a part of the original enactment, except that light may be thrown upon its meaning by the

fact that it is an amendment and by comparison of the old form with the amendment.

The precise point to be decided is whether the final sentence of § 8, quoted above, extends to executors the right to make deductions created by the words of the amending chapter 207 for the benefit of trustees. That amending chapter in substance creates an exemption from taxation of a part of the income of trustees. Exemptions from taxation are not to be lightly inferred, but must appear plainly either from the express words or necessary intendment of the statute. *Milford v. County Commissioners*, 213 Mass. 162, 165.

By the specific terms of St. 1918, c. 207, the deductions allowed to trustees are denied to guardians, conservators, trustees in bankruptcy, receivers and assignees for the benefit of creditors. If it had been the purpose of the Legislature to authorize these deductions from income for the benefit of executors, it would seem under these circumstances that direct manifestation of such purpose would appear in the words of the amending act rather than that that purpose be left to be worked out by reference to general words of the earlier act employed with different design and having in view at the time of their use a dissimilar end. At the time of the enactment of St. 1916, c. 269, neither § 8 nor § 9 allowed any deductions.

The title is in a legal sense a part of every statute and may be considered in determining its construction. *Proprietors of Mills v. Randolph*, 157 Mass. 345, 350. *Rice v. Winslow*, 180 Mass. 500, 501. *Lorain Steel Co. v. Norfolk & Bristol Street Railway*, 187 Mass. 500, 505. *Simpson v. Story*, 145 Mass. 497, 498. Compare *New England Trust Co. v. White*, 224 Mass. 332, 335. The title of St. 1918, c. 207, is "An Act relative to the income tax on property held in trust." While in a comprehensive sense executors hold property in trust, this title bears some implication in its context that it refers to the more restricted conception of property held in trust by trustees. The General Court had executors in mind in passing said c. 207, because in it the word "executors" occurs four times and the word "executor" once. If the object had been to confer the benefits of the act upon executors, it would have been a simple thing to have put that thought in unambiguous words.

The clause of § 8, upon which the petitioners rely for the deduction, makes applicable to executors the provisions of the act as to taxation of income received by trustees "so far as apt." The word "apt" in this connection suggests intimate similitude of conditions. Differences may be thought to exist between the conditions of investment of principal and the receipt of income by an executor whose duty is seasonably to settle the estate and distribute the assets and by a trustee who holds property for a longer or shorter period of time for purposes of gaining and disbursing income and who makes investment to that end.

Perhaps no one of these considerations by itself alone would be decisive, but in combination they lead us to the conclusion that the petitioners are not entitled to the abatement. There is in the act as thus construed nothing violative of the constitutional rights of the petitioners; and it is unnecessary to decide the validity of other provisions of St. 1918, c. 207, urged in argument to be unconstitutional.

In accordance with the provisions of St. 1909, c. 490, Part I, § 80, made applicable to this proceeding by St. 1916, c. 269, § 20, judgment shall be rendered for the Tax Commissioner for his expenses and costs, which shall be taxed by the Superior Court.

So ordered.

EMILY G. NORTON vs. MUSTEROLE COMPANY, INCORPORATED.

Middlesex. March 2, 1920. — May 19, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, CARROLL, & JENNEY, JJ.

Practice, Civil, Appeal, Abatement.

Upon an appeal, under R. L. c. 173, § 96, as amended by Sts. 1906, c. 342; 1910, c. 555, § 4, from a judgment entered upon a motion by the plaintiff (the defendant not moving) after the sustaining of an answer in abatement of a writ, the record properly before this court consists only of the writ, the declaration, the answer in abatement, the motion for judgment, the order allowing the motion and the appeal, and does not include a memorandum of facts found by the judge or copies of affidavits and of documentary evidence submitted to the judge at the hearing upon the answer in abatement.

A finding of fact made by a judge of the Superior Court in an order sustaining

an answer in abatement is not subject to review upon an appeal by the plaintiff from a judgment for the defendant entered in accordance with such order.

TORT for personal injuries resulting from use of a salve manufactured and sold by the defendant and alleged to contain ingredients so compounded as to be injurious and dangerous and unfit for use. Writ dated September 13, 1919.

The defendant, appearing specially, filed the plea in abatement described in the opinion. The plea was heard by *Wait, J.*, and was sustained. Thereafter, the defendant not moving, the plaintiff moved that judgment be entered "pursuant to the order of court sustaining the answer in abatement." The motion was allowed by *Hammond, J.*, and judgment was entered accordingly. The plaintiff appealed.

The printed record in this court contained copies of the plaintiff's claim of appeal, the writ, the declaration, the answer in abatement, the initialed statement described in the opinion, affidavits of C. F. Buescher, of Emily G. Norton, and of Harry C. Dunbar, Esquire, copy of a telegram from C. F. Buescher to Mr. Dunbar, copy of a letter from one J. Allison Barnes to Mr. Dunbar, the plaintiff's motion for judgment and a transcription of the docket entries.

H. C. Dunbar, for the plaintiff, submitted a brief.

P. D. Turner & Lee M. Friedman, for the defendant.

RUGG, C. J. This is an action at law sounding in tort. The defendant appeared specially and answered in abatement that it was a foreign corporation having no principal or usual place of business in the Commonwealth, and that it was not engaged in or soliciting business within the Commonwealth, and that it had here no agent authorized to receive service of process, and that it had not been made subject to the jurisdiction of the court. The answer in abatement was sustained and judgment was entered for the defendant, from which the plaintiff has appealed.

It is provided by St. 1910, c. 555, § 4, amending R. L. c. 173, § 96; St. 1906, c. 342, that "A party who is aggrieved by a judgment of the Superior Court upon a demurrer . . . or a party who is aggrieved by any other judgment founded upon matter of law apparent on the record in any proceeding, may appeal therefrom to the Supreme Judicial Court." Therefore an appeal in an action

at law brings before this court for consideration only "matter of law apparent on the record." The record before us consists of the writ, the plaintiff's declaration, the answer in abatement, a motion for judgment, the allowance of the same and the plaintiff's appeal. There is no error of law apparent on the face of these papers.

There is printed among other papers one not entitled nor signed, although identified by initials. Its words are: "Nov. 13, 1919. I find that the facts set out in the affidavit of C. F. Buescher, Emily G. Norton and Harry C. Dunbar, Esq., are true; I find and rule that the Musterole Company, Inc., is not 'engaged in or soliciting business' in this Commonwealth. This finding is based on said affidavits and inferences therefrom. The plea in abatement is found to be true and is sustained."

If it be assumed that this was a finding of facts by a judge of the Superior Court, it is no part of the record because not signed and embodied in a bill of exceptions or report. *Cressey v. Cressey*, 213 Mass. 191. *Naylor v. Nourse*, 231 Mass. 341, 343. *Standish v. Old Colony Railroad*, 129 Mass. 158. *Regal v. Lyon*, 212 Mass. 230, and cases collected. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 545.

If this unsigned paper be treated as a direction to the clerk concerning an entry to be made, and if it can be said that because the substance of this paper was extended on the "Docket Record," copy of which is before us, and that therefore it has become a part of the record of the case, (*Shanahan v. Boston & Northern Street Railway*, 193 Mass. 412, 413, § 1, General Rules as to Records promulgated by the justices of the Supreme Judicial Court under St. 1917, c. 206,) still it is only a finding of fact and decision. Manifestly a simple finding of fact discloses no error of law and cannot be revised by this court. It must be accepted as true. This court in actions at law does not weigh evidence nor revise findings of fact. *Atlantic Maritime Co. v. Gloucester*, 228 Mass. 519, 522.

The affidavits doubtless were received and treated as evidence. They are merely evidence, however, even though in writing and left among the papers in the case. They are no part of the record. The usual way to bring evidence before this court in an action at law is by exceptions or report. *Moran v. Murphy*, 230 Mass. 5, and cases there cited. *Rose v. Harrison*, 228 Mass. 261. *Carroll v.*

Daly, 162 Mass. 427. While the common way to extend pertinent evidence or material facts upon the record in an action at law is by exceptions, it may also be done by a case stated, by agreed facts, by facts agreed upon as evidence, by report, and by special verdict. *Frati v. Jannini*, 226 Mass. 430. *Harmon v. Sweet*, 221 Mass. 587, 598. See *O'Brien v. Keefe*, 175 Mass. 274. No one of these methods was pursued in the case at bar.

The question of law whether on the facts found by the judge, with the inferences drawn therefrom, the defendant was engaged in or soliciting business within the Commonwealth or had been made subject to the jurisdiction of the court, was proper matter for a request for ruling of law, and if refused, for exception. It does not appear that any such request for ruling was made, or that any exception was saved. On this record the only matter presented is a finding of fact made by a judge in a case heard without a jury. The principle that such finding of fact must be accepted as final and is not subject to review in this way is too familiar to require further reference to authorities. The simple and plain way to present the question of law, whether on the evidence a decision may be made in one way, is by bill of exceptions. That involves a request for a ruling of law, and an exception either to its denial or granting.

Judgment affirmed.

BOSTON CONSOLIDATED GAS COMPANY *vs.* DEPARTMENT OF
PUBLIC UTILITIES.

SAME *vs.* SAME.

Suffolk. March 4, 1920. — May 19, 1920.

Present: RUGG, C. J., DE COURCY, PIERCE, CARROLL, & JENNEY, JJ.

Department of Public Utilities. Boston Consolidated Gas Company. Jurisdiction.

After the board of gas and electric light commissioners, acting under the power conferred upon them by St. 1903, c. 417, § 6, had approved of a contract dated September 27, 1917, relating to the sale of gas to the Boston Consolidated Gas Company by the New England Fuel and Transportation Company and the price

to be paid therefor, one provision of which was that, "upon the termination of the [world] war or the termination of the government's demand for toluol, the question of the price which shall thereafter control this contract shall be resubmitted to the board, and the price thereafter shall be such price as the parties may agree upon, provided it is less than the board shall determine it would then cost the Boston Consolidated Gas Company to make its own gas under the conditions specified in" St. 1903, c. 417, § 6, and has found that a new price agreed upon by the parties on December 11, 1918, after the government's demand for toluol had ceased, was less than the standard fixed in the statute and the contract of September 27, 1917, no further approval by the board of gas and electric light commissioners or their successors under St. 1919, c. 350, § 117, the commissioners of the department of public utilities, is necessary to make the new price effective between the parties to the contract as of the date, December 11, 1918.

Under St. 1903, c. 417, § 6, neither the board of gas and electric light commissioners nor their successors, the commissioners of the department of public utilities, have power or jurisdiction to refuse approval of a contract by the Boston Consolidated Gas Company for the purchase of gas if the price to be paid therefor "is less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company."

The board of gas and electric light commissioners, upon a price to be paid by the Boston Consolidated Gas Company to another company for gas being submitted to them for approval under St. 1903, c. 417, § 6, have no power nor jurisdiction to disapprove of the price, if they find it to be "less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type, properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company," although they also find that "These companies, owned, controlled and managed by the same interest, for a number of years have had contracts for the purchase of gas, and until very recently they were very profitable to the . . . [other company]. Now in the time of abnormal conditions when the Boston Consolidated Gas Company should profit by the transaction, it is attempted to raise the price beyond what appears to the Board to be fair and reasonable in view of all the conditions surrounding it."

It was *stated*, that it is not to be inferred from the foregoing decision that the department of public utilities, by the approval of a contract or otherwise, may bind itself not to exercise at all times the functions vested in it by Sts. 1903, c. 417, § 6; 1919, c. 350, § 117.

It further was *stated*, that, in making the foregoing decision, no intimation was made as to the scope and effect of the first part of the second sentence of St. 1903, c. 417, § 6, whereby power is conferred upon the board to determine "from time to time . . . the period or periods during which" the Boston Consolidated Gas Company may purchase its gas at these prices.

PETITION, filed in the Supreme Judicial Court on January 29, 1920, for a writ of mandamus directing the commissioners of the Department of Public Utilities to approve an agreement made on

July 21, 1919, between the petitioner and the New England Fuel and Transportation Company, a voluntary association; also a

PETITION, filed in the same court on the same day, for a writ of certiorari, directing the same commissioners to certify the records of the Board of Gas and Electric Light Commissioners, whom under St. 1919, c. 350, § 117, they succeeded, relating to proceedings described in the opinion, to the end that such proceedings might be quashed and other appropriate relief given.

By order of *Crosby, J.*, the two petitions were consolidated for hearing and adjudication, and then were heard by him. The single justice filed the following memorandum and order for judgment:

"The Board of Gas and Electric Light Commissioners having found under St. 1903, c. 417, § 6, that under the contract between the petitioner and the New England Fuel and Transportation Company dated September 27, 1917, as amended by agreement of July 21, 1919, by which the price to be paid for gas under the original contract is increased to 35 cents per thousand cubic feet, is less than it would cost the petitioners to make its gas in gas works of standard type, properly equipped, suitably situated, and of sufficient capacity to make all the gas required by the whole district supplied by said company, it was the legal duty of the Commissioners to approve the change in price and it is now the legal duty of the respondents to approve said change in price, and I so rule. I am of opinion and rule that the Board of Gas and Electric Light Commissioners cannot lawfully refuse to approve the change in price for the reason stated or for any other reason in view of the findings made and above referred to. I also rule that the respondents are bound by the findings so made and that the legal duty is imposed upon them to approve the agreement of July 21, 1919. The result is that the petitioner is entitled to a writ of mandamus, which is to issue."

Other facts shown by the pleadings are described in the opinion.

At the request of the respondent the single justice reported and reserved the petitions for determination by the full court upon the pleadings and his memorandum of rulings of law and order for judgment.

A. E. Seagrave, Assistant Attorney General, for the respondent.

R. H. Holt, for the petitioner.

RUGG, C. J. The Boston Consolidated Gas Company was incorporated by St. 1903, c. 417. Section 6 of that act is in these words: "Said Boston Consolidated Gas Company shall not purchase any gas until the board of gas and electric light commissioners have found after public hearing that the price to be paid for the gas to be purchased is less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company. Said board may from time to time determine the period or periods during which said company may so purchase its gas at the price aforesaid; and no contract for the purchase of gas for more than thirty days shall be made without the approval of said board. No contract which the Boston Consolidated Gas Company shall make for the purchase of any portion of its gas shall in any respect affect any authority conferred on said board by this act or by section thirty-four of chapter one hundred and twenty-one of the Revised Laws or by any general laws which may hereafter be in force to fix the price to be charged by said company for gas."

That company entered into a contract with the New England Fuel and Transportation Company under date of September 27, 1917, for the purchase of gas. The contract was duly approved by the board of gas and electric light commissioners according to the requirements of said § 6 and became operative and binding upon the parties. Paragraph seven of that contract reads as follows: "This contract shall continue until two years after the expiration of the war or until terminated either by the Gas Company or the Fuel Company as hereinafter provided. Either the Gas Company or the Fuel Company may at any time notify, in writing, the other party of its decision to terminate the contract at a period not less than two years from the giving of such notice, and upon the date fixed for such termination this contract shall cease and determine. But upon the termination of the war or the termination of the Government's demand for toluol, the question of the price which shall thereafter control this contract shall be resubmitted to the Board, and the price thereafter shall be such price as the parties may agree upon, provided it is less than the Board shall determine it would then cost the Boston Con-

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solidated Gas Company to make its own gas under the conditions specified in Section six of Chapter 417 of the Acts of 1903."

Under date of December 11, 1918, the Boston Company and the New England Company entered into a new contract, the terms of which differed in some important particulars from that of September 27, 1917. One material difference was the price of the gas to be furnished, the earlier contract fixing it at twenty-nine and a half cents per thousand cubic feet, and the new one at thirty-five cents per thousand cubic feet. This proposed contract was presented to the board and was disapproved by a majority of its members. Proceedings respecting that contract were abandoned. Their only pertinency now is that all the board concurred in finding that the price of thirty-five cents per thousand cubic feet "is less than it would cost the Boston Consolidated Gas Company to make its gas in gas works of standard type, properly equipped, suitably situated, and of sufficient capacity to make all the gas required by the whole district supplied by this company," thus following vital words of said § 6, a finding incorporated by reference into the decision under examination in the case at bar.

After the disapproval by the board of the proposed contract dated December 11, 1918, the Boston Company and the New England Company signed a document of the tenor following: "July 21, 1919. Referring to the contract between the undersigned dated September 27, 1917, and particularly to the Seventh Paragraph thereof, it is agreed that commencing with the 15th day of December, 1918, which time is subsequent to the termination of the Government's demand for Toluol, the price of gas furnished in accordance with said contract during the remaining term thereof shall be thirty-five cents (35c) per thousand cubic feet." This also was presented to the board. The matter was considered without another publicly advertised hearing, the board deeming it unnecessary and the parties consenting. After finding that the government's demand for toluol ceased in November, 1918, and referring to its previous finding that that price of thirty-five cents per thousand cubic feet conformed to the conditions set forth in § 6 of the act, the board states in its vote of October 6, 1919: "The company now contends that the Board is limited in its authority to a finding on the question as to whether

or not the price is more or 'less than it would cost the Boston Consolidated Gas Company to make its own gas,' etc., under the conditions specified in the contract, and that the amendment to the contract should therefore be approved; but as stated in the opinion of July 7, the majority of the Board is unwilling to agree to this narrow construction of the clause. The resubmission by the companies of the contract, or of any amendment thereof, to the Board for approval must necessarily give to the Board the right to exercise its discretion as is provided for in said section 6, chapter 417, of the Acts of 1903, by which section the Board is not limited to a determination of the question as to whether the price is more or 'less than it would cost the Boston Consolidated Gas Company to make its own gas,' etc. Nothing contained in said paragraph seven of the agreement of September 27, 1917, 'can possibly limit the authority of the Board on the question of the approval of a new contract.' That vote concluded with the determination, "That the proposed amendment to said contract is hereby disapproved."

There is manifest error in this construction of the duty of the board. No new contract was before the board. The subsisting contract of September 27, 1917, was in force. The board had approved that contract, including paragraph seven, already quoted. That paragraph in express and unmistakable terms provided that the price therein stipulated should, after agreement by the parties, change automatically upon the coincidence of two events; first, either (a) the end of the war, or (b) the termination of the government's demand for fuel, and, second, a determination by the board that the new price agreed upon by the parties was less than it would cost the Boston Company to make its own gas under the conditions specified in said § 6. Upon the concurrent existence of these two conditions precedent the price was, after agreement by the parties, to change according to the terms of the contract already approved by the board and binding upon the parties.

The proposed change in price agreed upon by the parties, pursuant to the terms of paragraph seven of their contract, required presentation to the board under the terms of § 6 of the act, because it affected the price to be paid by the Boston Company for its gas. The function of the board with reference to this proposed

change in price was a limited one. Under the provisions of § 6 of the act in combination with the contract already approved by the board, and especially in view of paragraph seven thereof, the field of action by the board was confined to ascertainment of the two conditions already pointed out, and did not permit a general survey of factors having no relation to those two conditions. The question before the board was not the approval of a new contract. All the stipulations of the contract were fixed for a definite and reasonably limited period of time. If changed conditions rendered necessary a modification of the price to be paid, the board already had decided by the approval of that contract precisely how that change should be ascertained. The ground upon which a refusal to approve the price was based by the board was (by reference in its vote of October 6, 1919, to its vote of July 7, 1919) that "These companies, owned, controlled and managed by the same interest, for a number of years have had contracts for the purchase of gas, and until very recently they were very profitable to the New England Gas & Coke Company and later its successor, the New England Fuel & Transportation Company. Now in the time of abnormal conditions when the Boston Consolidated Gas Company should profit by the transaction, it is attempted to raise the price beyond what appears to the Board to be fair and reasonable in view of all the conditions surrounding it." That ground was wholly irrelevant to the narrow issue presented by the request then before the board. The previous contracts as to price must have been approved by the board as in conformity to law. If they had been profitable, it was because of that approval. The fact of common ownership of the Boston Company and the New England Company was known to the Legislature prior to the incorporation of the petitioner. Res. 1898, c. 101. Fifteenth Report of Gas & Electric Light Commissioners, pages 31 to 46; Eighteenth Report *ibid.*, pages 5 to 9. It may be presumed that § 6 was phrased and included in said c. 417 with that fact in mind by the General Court.

As matter of construction of § 6 of St. 1903, c. 417, such considerations as are set forth in the vote of the majority of the board dated July 7, 1919, are irrelevant to the duty devolved upon the board. That section does not confer upon the board the right to fix a price for gas which in its opinion is fair and reasonable or

wise or unwise on other grounds. Nor is it given an unqualified power of approval of the price of gas to be purchased by the Boston Company. When the Legislature desired to confer that power upon the board it employed apt and unequivocal words to express that meaning. See, for example, § 4 of said act, where it is provided that the price to be paid by the Boston Company for stocks and physical properties purchased by it, and the amounts at which assets so purchased may be capitalized, are to be fixed by the board. The rule of guidance there laid down was "fair value." It also is provided by § 11 of the act that the price for the sale of gas by the Boston Consolidated Gas Company to any other gas company, or to any city or town, shall be "subject to the approval of the board" without other limitation.

The power conferred upon the Boston Company by the first sentence of § 6 of the act is to purchase gas at a price less than it would cost that company to make its own gas under the conditions therein set forth, as found by the board after a public hearing. The next sentence of the section confers power upon the board to determine from time to time the period or periods during which the Boston Company "may so purchase its gas at the price aforesaid," that is to say, the price agreed upon between the Boston Company and its vendor of gas, which price has been found by the board to be less than the cost price to the Boston Company making gas under the specified conditions. That is the only "price aforesaid" in the section or act. The words following, to the effect that "no contract for the purchase of gas for more than thirty days shall be made without the approval of said board," in this context plainly can only mean that such general power of approval relates alone to the terms of the contract other than the price, because the way in which the price is to be determined already has been particularized by the earlier provisions of the section. That is the clear meaning of the words of the section interpreted according to correct canons of statutory construction. It is confirmed by practical considerations. A public hearing and a decision involving inquiry into the art of gas making and the cost and depreciation and replacement value of extensive gas works would be futile if, after all, the price to be paid for the gas purchased must be approved by the board according to its untrammelled opinion. The public interest is further protected by

the express reservation in the last sentence of § 6 that no contract of the Boston Company for the purchase of gas should affect the general power of the board to fix the price which it should charge for gas to the consumer.

No inference is to be drawn from the conclusion here reached that the board by the approval of a contract or otherwise may bind itself not to exercise at all times the functions vested in it by the statute.

The scope and effect of the first part of the second sentence of § 6, whereby power is conferred upon the board to determine "from time to time . . . the period or periods during which" the Boston Consolidated Gas Company may purchase its gas at these prices, is not presented on this record and no intimation is made on that point.

The result is that the board already has done all that is necessary to make effective the price of thirty-five cents per thousand cubic feet from December 15, 1918. It has found that on that date the government had ceased to demand toluol and that that price was less than it would cost the Boston Company to make its gas under the conditions specified in § 6 of the act. The determination of the board by fair interpretation under all the circumstances means that the cost ascertained by it was as of December 15, 1918.

It follows that the petitioner needs no relief. The entry in each case may be

Petition dismissed.

MOSES PIMENTAL'S CASE.

Suffolk. March 8, 1920. — May 19, 1920.

Present: RUGG, C. J., BRALEY, CROSBY, PIERCE, & JENNEY, JJ.

Workmen's Compensation Act, Injuries to which act applies. Proximate Cause.

Incapacity of a cigar maker, caused by neuralgic pain which, in a proceeding under the workmen's compensation act, an impartial physician testified was likely to be caused by any other occupation and could result independently of any occupation or from any sitting or standing occupation, and which, upon evidence including that of the impartial physician, the Industrial Accident Board found

was induced by muscular action in rolling cigars, while it properly may be found to have arisen during the course of the employee's employment, cannot be found to have arisen from it in such a sense as to entitle him to compensation under the workmen's compensation act.

An occupational disease is not a personal injury, arising out of and in the course of employment, compensation for which may be awarded under St. 1911, c. 751, Part II, § 1.

APPEAL under the workmen's compensation act from a decision of the Industrial Accident Board granting compensation of \$14 a week to the employee for injuries, described in the opinion, found by the board to have arisen out of and in the course of his employment by Alles and Fisher Cigar Company.

In the Superior Court the appeal was heard by *Wait, J.* Material evidence is described in the opinion. A decree was entered in accordance with the decision of the Industrial Accident Board; and the insurer appealed.

G. Gleason, for the insurer.

P. L. Keenan, for the employee.

CROSBY, J. The employee is a cigar maker and worked continually at his trade for fourteen or fifteen years. Early in the year 1918 he began to have pain in the region of the back of his neck, and in February or March, 1919, he consulted a physician who told him that he had occupational neurosis. On May 2, 1919, he was obliged to give up his work.

William J. Daly, the impartial physician, testified that the employee had "an undeveloped left side; a shortened left leg with sinuses from old pus processes about the left buttock and the anterior surface of the hip; . . . faulty posture both in standing and sitting; . . . distortion of the spinal column . . . [the result] of faulty posture, and . . . a malformation of the thoracic bone cage;" that "all this distortion and malformation had the effect of producing bony pressure on the spinal nerves . . . so that when the loading upon this region, incident upon muscular action in rolling cigars, took place, after a number of years, it produced neuralgic pain. . . . In consequence of his working and using the movements he did his work as a cigar maker was a certain consequence of causing his condition. In the first place, he sits faulty; his left buttock being undeveloped, his left pelvis sags. He does not sit evenly on the buttocks. In that way he crowds the vertebra unevenly in the other parts of the spine, so that any sitting oc-

cupation could contribute to the brachial pain. . . . In a man with no asymmetry, who was in a fair state of nutrition, this condition probably never would develop. . . . The particular movements which produce this condition are the rolling process at the end of the making of a cigar, whereby a weight of the forearm, arm, and some of the shoulder and shoulder girdle are brought down upon the cigar in order to make a firm wrapper." He further testified he "was of the opinion that if the employee had a sitting down job where there was no muscular loading or tension, as in the rolling process, he might have supported the condition of his spine for years longer without trouble. He believed that the upset factor in the thing was the muscular tension and the loading incidental upon the rolling movements; . . . that the employee's condition would come on or did come on quicker because he rolled cigars than it would have had he worked at any other sitting down occupation. . . . He thought that the rolling movements are the movements which brought about the pain. . . . This employee has not neuritis." Further, "He thought that if the employee assumed a different posture by putting a pad under his left hip, and by raising the table at which he worked, he would go along 'all right.'" "In his opinion, any sitting occupation is likely to cause the neuralgic pain which this employee experienced in the region of his neck. If he sat for eight hours a day in his home reading a book 'with his hip in that position, in any position,' he would be likely to have the same sort of a pressure in that brachial region as he had while sitting at work. If he sat in a chair at his home over a period of fourteen years, reading a book every day, he might get from that the neuralgic pain which he experienced in March of 1919."

Another physician testified that he had examined the employee and that "he did not see how his occupation could produce his condition. This employee's occupation involved chiefly the use of his arms, and his arms were free from all trouble. . . . This employee's condition is not in the muscles; it is in the skin, as far as he could determine . . . that occupational neurosis is due to the action of muscles used in the occupation. . . . He was of the opinion that there was a mental situation in this case. . . . He attributed this employee's condition to a combination of a mental attitude and a skin sensation."

The single member found that "while there was an underlying and pre-existing condition, following hip disease, it was the muscular action in rolling cigars for a number of years which precipitated the neuralgic pain and brought into being the personal injury which totally incapacitated the employee for work;" and that "Finally, as a result of the effect of the muscular movements required by his employment in making cigars, acting upon his particular condition of health, neuralgic pain, a personal injury under this act, developed. The employee's total incapacity for work is due to that personal injury and will continue for a period which is not now determinable." He also found that the employee was entitled to compensation under the act. On the same evidence the Industrial Accident Board adopted the findings and rulings of the single member.

The case at bar is similar in many respects to *Maggelet's Case*, 228 Mass. 57, and is governed by it. While the board found that the neuralgic pain was induced by muscular action in rolling cigars for a number of years, the impartial physician testified that any other occupation was likely to cause the pain from which the employee suffered, and that this condition could result independently of any occupation, and could come from any sitting or standing occupation; in view of this, together with all the other evidence, we are of opinion that the pain could not have been found to have been a reasonably necessary result of the employment, and cannot be said to have been a personal injury peculiar to it.

We are also of opinion that there was no sufficient evidence to warrant a finding that the employee had neurosis, — a disease with which cigar makers are sometimes afflicted, — and the impartial physician so testified; nor is there evidence that he had any disease, the reasonable inference being that the neuralgic pain was not due to his occupation but was rather the result of faulty posture brought about by long and laborious work, a condition which would have been equally liable to arise in whatever employment he might have been engaged, or if not employed at all. *McNicol's Case*, 215 Mass. 497. *Donahue's Case*, 226 Mass. 595. Although the condition arose during the course of the employment, it cannot be found to have arisen from it. "A nervous condition dependent upon poor posture of the body in our opinion does not

constitute a commonly known and well recognized personal injury consequent upon employment. . . . But personal injury and disease are not synonymous. They are different in meaning. One does not include the other." *Maggelet's Case*, 228 Mass. 57, 61, 62.

If it could be held that the employee was suffering from an occupational disease, still the workmen's compensation act does not in terms include disease. See St. 1913, c. 813, § 12. It cannot be held to cover disease contracted by employees in the course of and arising out of their employment. Pain is not disease, nor is disease resulting in pain a personal injury.

In *Hurle's Case*, 217 Mass. 223, *Johnson's Case*, 217 Mass. 388, and *Doherty's Case*, 222 Mass. 98, there was evidence that the employee was suffering from poisoning arising from the performance of his work. Poisoning has generally been regarded as in the nature of a personal injury, *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, but the doctrine of those cases which dealt with disabilities in the nature of personal injuries cannot be held to apply to the present case. The language in the opinion in *Johnson's Case*, *supra*, is to be limited to the precise facts in that case and is not an authority in favor of the contention of the employee in the case at bar.

While the act should be construed liberally, it should not be extended to cases which cannot reasonably be interpreted as within its scope. The statement in *Maggelet's Case*, *supra*, at page 61, that "No case has gone so far as to hold that a 'neurosis of the nerves' supplying certain muscles, resulting from a posture which causes the employee 'to bend forward with shoulders forward' so as to induce 'pressure on the brachial plexus' is a personal injury," applies in principle to the case at bar, although the employee is not suffering from neurosis, and notwithstanding the finding of the board that as a result of the muscular movements required in rolling cigars acting upon his particular condition, neuralgic pain developed.

It follows that the decree must be reversed and a decree entered in favor of the insurer.

So ordered.

INDEX.

ABATEMENT.

Of an action at law, see that subtitle under PRACTICE, CIVIL.

Of a tax, see that subtitle under TAX.

ACCORD AND SATISFACTION.

An oral agreement by a judgment creditor with the judgment debtor to receive a certain sum, less in amount than the judgment debt, in full satisfaction of that judgment debt and also of a judgment debt owed to the creditor by another person, to which the first judgment debtor is a stranger, and to indorse satisfaction in full upon executions which had issued upon both judgments, when the first judgment debtor has made the payment stipulated and the creditor has made the indorsement of full satisfaction upon both executions, is not *nudum pactum*, and a suit in equity by the judgment creditor to enforce the first judgment must be dismissed. *Barnett v. Rosen*, 244.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMIRALTY.

One employed on a ship as ship's cook and seaman, who receives personal injuries when boarding his ship in tidewater by reason of the breaking of a defective ratline, which properly was being used by him and which should have been kept in a safe condition by the owner of the ship, may recover damages for his injuries in an action of tort at common law against the owner of the vessel in the Superior Court. *Proctor v. Dillon*, 538.

It seems, that, according to the practice of the admiralty courts, the right of recovery by the seaman under the circumstances above described rests upon proof of negligence of the owner. *Ibid.*

ADVERSE POSSESSION OR USE.

Where land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title, the widow died in 1889, leaving surviving her her husband and children of their union and the husband died in 1900 it was held, that the deed of the husband in 1863

Adverse Possession or Use (*continued*).

conveyed a freehold in the land for his life, leaving rights in reversion in the heirs of his wife. *Nickerson v. Nickerson*, 348.

In the same suit it was held that the owners in reversion were not required to assert their rights in opposition to acts of disseisin by the grantee in the deed of 1863 until the termination in 1900 of the life estate thereby conveyed. *Ibid.*

In the same suit it also was held that the statute of limitations did not begin to run against the heirs of the married woman until the termination of the life estate in 1900. *Ibid.*

Sole and uninterrupted possession of land, owned in common, by one of the tenants in common with appropriation by him of the profits with the knowledge of the others, if continued for a long series of years, unexplained and uncontrolled by any evidence tending to show a reason for the failure of the other tenants in common to assert rights, furnishes evidence upon which an inference of an actual ouster and adverse possession may and ought to be drawn. *Ibid.*

Evidence in a petition for registration of the title to land brought in 1918 by the sole heir of the grantee in a deed of 1865 from the sisters of the grantee which was void because their husbands did not join therein nor assent thereto upon which it was held that a finding by the judge of the Land Court that as to one of his sisters and her heirs the petitioner had gained a title by adverse possession was warranted. *Ibid.*

Where a married woman executed a deed of land in 1865 in which her husband did not join and to which he did not assent in writing, and the grantee at once entered into possession of the land and she died in 1889, leaving surviving her husband and children of their union, and the husband died in 1900, it was held that, until the termination by her husband's death of his tenancy by curtesy, the statute of limitations did not begin to run against her heirs' right in the land, which arose from the fact that her deed was void. *Ibid.*

Where land owned by a married woman was conveyed in 1851 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of his title and the woman survived her husband and died in 1892, it was held that the petitioner had gained a title to the land by adverse possession. *Ibid.*

The provisions of Sts. 1861, c. 100; 1874, c. 372, § 107; Pub. Sts. c. 112, § 215; R. L. c. 111, § 271; St. 1906, c. 463, Part II, § 80, prevent the acquiring, by the owner of land adjoining a railroad location, of a title by adverse possession to the whole or to any part of the location or to an easement therein of support for structures on the adjoining owner's land. *Hurlbut Rogers Machinery Co. v. Boston & Maine Railroad*, 402.

AGENCY.

Existence of Relation.

Evidence in an action against a stockbroker by a customer for money had and received where the plaintiff requested an officer of a trust company to transmit an order for certain shares of stock to the defendant upon which it

was held that a finding was warranted that the officer of the trust company was the plaintiff's agent and that the plaintiff was charged with his knowledge. *Bendslev v. Lovell*, 133.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. *Vaughan v. Mansfield*, 147.

In an action by an indorser against the maker of a promissory note it was held that the evidence warranted a finding that the husband of the plaintiff acted as her agent. *Bovarnick v. Davis*, 195.

Evidence in a suit involving the validity of a certain contract in writing signed without a seal by the president of a corporation with his individual name upon which it was held that the contract was the contract of the corporation. *Director General of Railroads v. Peoples Express, Inc.* 199.

Subsidiary findings of a master, to whom was referred a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor, which were held were not incompatible with the finding that the man was acting as the plaintiff's agent. *Glover v. Waltham Laundry Co.* 330.

Evidence at the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, where it appeared that a police officer called by the manager of the hotel caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless, upon which it was held that a finding was warranted that the officer was constituted the agent of the defendant to arrest the plaintiff and to institute against her whatever criminal proceedings in his opinion could be sustained in any view of the acts of the plaintiff at the restaurant. *Mason v. Jacot*, 521.

Scope of Authority or Employment.

Evidence at the trial of an action for personal injuries caused by the negligent operation of a motor truck of the defendant by a driver hired by the defendant's father to deliver an order of ice cream manufactured by the defendant, upon which it was held that a finding was warranted that such transient employment of a stranger for the purpose of delivering ice cream in the manner ordinarily employed by the defendant was within the scope of the authority of the defendant's father. *Coyne v. Maniatty*, 181.

A Massachusetts stockbroker has the legal title to securities acquired by him under a contract, made with a customer who is a resident of Massachusetts and to be performed here, by the provisions of which the stockbroker is to receive, buy, sell and carry securities on margin; and, the customer being without a right to immediate possession, the stockbroker, if he uses the securities for his own purposes, is not liable to the customer in an action of tort for conversion. *Crehan v. Megargel*, 279.

A Massachusetts stockbroker, who has acquired securities under an agreement with a Massachusetts customer, made and to be performed in Massachusetts,

Agency (continued).

whereby the stockbroker is to receive and carry securities as margin for the customer's account, if he fails to carry the securities as margin and uses them for his own purposes, may be charged with their value in an action by the customer for money had and received. *Crehan v. Megargel*, 279.

Evidence at the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, where it appeared that a police officer called by the manager of the hotel caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless, upon which it was held that a finding was warranted that the officer was constituted the agent of the defendant to arrest the plaintiff and to institute against her whatever criminal proceedings in his opinion could be sustained in any view of the acts of the plaintiff at the restaurant. *Mason v. Jacot*, 521.

Evidence in the above described action upon which it was held that the making of a complaint for drunkenness might fairly be regarded as within the terms of the discretion given to the police officer under all the circumstances. *Ibid.*

Officers and Agents of Corporations.

See appropriate subtitle under CORPORATION.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

AMENDMENT.

See that subtitle under PRACTICE, CIVIL.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PROBATE COURT.

ASSIGNMENT.

An assignee of a right of action upon an account for goods sold, who gave no notice of the assignment to the debtor, cannot maintain an action for money had and received against one to whom his assignor, after the assignment to him, for a valid consideration assigned the same right of action and who, in good faith and without knowledge of the first assignment, in his own right as assignee received the amount of the debt from the debtor. *Rabinowitz v. People's National Bank*, 102.

Upon a bill of interpleader brought by an insurer in a policy of life insurance which had been assigned by the insured and the beneficiary under the policy

it was held that a finding of the judge excepted to by the defendant must be assumed to be warranted by the evidence, which was not reported, and that the exception must be overruled. *Connecticut Mutual Life Ins. Co. v. Allen*, 187.

In the suit above described, a request by the trustee in bankruptcy for a ruling that, if the beneficiary under the policy "did not sign the note, but did sign the assignment," the assignee "could not recover," was held to have been refused properly. *Ibid.*

In the same suit it also was held that, a finding being warranted that the assignee held the policy as a pledge for the payment of money advanced and interest by virtue of an assignment executed by the beneficiary under the policy, his claim, to the extent of the amount due him, was superior to the claim of the trustee in bankruptcy, which was no greater than that of the beneficiary, and that a refusal to rule that the assignee "could not recover" was proper. *Ibid.*

By St. 1909, c. 514, §§ 121-126, the rule of the common law, that wages to be earned under a contract of service not yet made are not assignable, was changed, and, under the provisions of that statute and its amendments, all wages earned by the assignor within two years from the date of the assignment from any person who might employ him during that period became assignable upon the requirements of the statute being satisfied. *Raulens v. Levi*, 232 Mass. 42, distinguished. *Gilman v. Raymond*, 284.

An assignment of wages in the statutory form required by St. 1909, c. 514, § 124, as amended by St. 1916, c. 208, § 2, which provided that "three fourths of the weekly earnings or wages . . . are exempt from this assignment," being an assignment of a part only of the debt due to the assignor, is not enforceable in an action at law by the assignee against one who employed the assignor during the two years covered by the assignment and who, although he received notice of the assignment, did not accept it, but refused to pay money to the assignee. *Ibid.*

ATTACHMENT.

Evidence in a suit by a guardian of an insane person to set aside a deed made for a nominal consideration by the insane person conveying certain real estate and another deed made by his grantee to the insane person and a third person for a nominal consideration conveying the same real estate upon which it was held that the guardian of the insane person was entitled to an injunction against an attaching creditor to restrain the enforcement of his judgment against the land because, although the attaching creditor was in the position of a purchaser for value, he obtained by his attachment no greater right than the judgment debtor had, and, the insane person's deed being voidable as to the judgment debtor, was voidable as to the attaching creditor and should be declared void. *Brewster v. Weston*, 14.

In an action where an attachment was made of an automobile stored upon premises of the plaintiff and, without removing the automobile, the officer placed it in the custody of a keeper and at the end of ten days removed it to another part of the plaintiff's premises where it was secured by a chain fastened and locked across the rear wheels, the trial judge as a part of the plaintiff's taxable costs allowed the officer's charges of \$10 for custody and \$60 for keeper and disallowed \$17 claimed for storage and it was held that

Attachment (*continued*).

under St. 1913, c. 611, § 1, a charge of \$10 for custody was permissible and that, the allowance of \$60 for keeper not being a manifest error of law, was not reviewable by this court, it being within the discretion of the judge to allow for a keeper's charge an amount in excess of \$2 a day for ten days. *Helliwell Garages, Inc. v. Feinberg*, 258.

Where, in an action of contract begun by trustee process against two non-residents as copartners, it appeared that the defendants were not served personally with process but that property in this State had been attached by the trustee process as the property of the defendants, and that a bond had been given by them under R. L. c. 167, § 116, as amended by Sts. 1905, c. 110; 1906, c. 187, to release the attachment, the giving of the bond operated as a general appearance by the defendants, and the action should not be dismissed although no service was made upon them. *Britton v. Goodman*, 471.

While one, who has an attachment upon real estate subject to a mortgage, has a right to redeem from the mortgage, if, without making to the mortgagee any tender of the amount due upon the mortgage obligation, he permits the property to be sold at a sale duly conducted in execution of a power of sale in the mortgage deed giving the mortgagee the privilege of becoming a purchaser at the sale, his right of redemption is lost, although he attended and was a bidder at the sale and the mortgagee became the purchaser. *Ryder v. Brockton Savings Bank*, 476.

ATTEMPT TO COMMIT CRIME.

There is no error in sentencing to the house of correction for thirty months one who has been found guilty on two counts of an indictment severally charging him with separate attempts to commit larceny from the person. *Lebowitch, petitioner*, 357.

AUTOMOBILE.

See MOTOR VEHICLE.

BANK.

The drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a *bona fide* holder for value; and, in the absence of an express contract limiting its implied obligation to the drawer, if a bank upon which the check is drawn pays the check after receiving an order to stop its payment, it does so at its peril. *Tremont Trust Co. v. Burack*, 398.

In an action by a bank against the drawer of a check upon it for an overdraft in the drawer's account caused by the negligent payment of the check by the bank after the drawer had given the bank an order to stop its payment it was held that the meaning of an agreement between the bank and the drawer was that the bank should be exonerated from liability to the drawer if, through the kind of negligence described, it paid the check after receiving the notice to stop payment. *Ibid*.

An agreement in writing signed by the drawer of a check, upon giving to a bank upon which it was drawn an order to stop its payment, that he would not hold the bank liable "on account of payment contrary to this request if same occur through inadvertence or accident" was held not contrary to public policy and was valid. *Tremont Trust Co. v. Burack*, 398.

BASTARDY.

The Superior Court has jurisdiction under St. 1913, c. 563, § 1, to proceed by indictment against one who gets a woman with child, not being her husband. *Commonwealth v. Mekelburg*, 383.

Fifteen letters and post cards received from the defendant by the complainant between January 7 and July 23, 1918, which were admitted in evidence at the trial of a complaint under St. 1913, c. 563, charging that the defendant, not being the husband of the complainant, did get her with child on January 18, 1919, which were held were not too distinct in character nor remote in time, and were admissible to establish and characterize the intimacy between the parties. *Commonwealth v. Brophy*, 438.

BILL OF LADING.

Where a through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be presumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage" the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and the burden of proving such negligence was upon the shipper. *Florida Cotton Oil Co. v. Clyde Steamship Co.* 10.

Where goods, shipped by water by a through bill of lading, in the course of the shipment are transferred from one carrier to another, any valid limitation of liability contained in the through bill of lading issued by the first carrier enures to the benefit of the second carrier. *Ibid.*

BILLS AND NOTES.

Validity.

Evidence in an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as a part of an agreement made upon the third director severing his active connection with the corporation which also provided that the plaintiff should receive the equivalent of one month's salary, \$600, which should "be applied on account of his indebtedness to" the corporation "for unpaid stock subscription" upon which it was held that the note in suit being issued as a part of an invalid agreement, it was proper to refuse to rule that there should be a finding for the plaintiff. *Moss v. Copelef*, 162.

Evidence upon a bill of interpleader brought by an insurer in a policy of life insurance which had been assigned by the insured and the beneficiary under the policy "In Consideration of Fifteen Hundred Dollars to us paid," to one

from whom the insured had borrowed that sum of money, where it appeared that the insured also delivered to the assignee a promissory note bearing his signature and the forged signature of the beneficiary upon which a request by the trustee in bankruptcy of the beneficiary for a ruling that, if the beneficiary under the policy "did not sign the note, but did sign the assignment" the assignee "could not recover," was held to have been refused properly. *Connecticut Mutual Life Ins. Co. v. Allen*, 187.

An instrument, given by a purchaser of goods to the seller with two post-dated checks, and reciting that the seller had received \$1,000 from the purchaser "on account. Balance to be paid in sixty days. Total \$2000 70/100; balance \$1000 70/100," is not a promissory note. *Bergman v. Granstein*, 378.

Construction.

Upon a promissory note reading, "Four years after date I promise to pay to the order of B two thousand . . . dollars. Payable after three years, at the rate of \$500 quarterly, with interest at 6%," \$500 of the principal sum became due three years from the date of the note and \$500 every three months thereafter during the fourth year. *Beaman v. Gerrish*, 79.

The word "payable" in negotiable instruments commonly implies imperative obligation on the part of the maker unless accompanied by additional words expressive of option vested in the maker. *Ibid*.

Maker.

It seems that, under the provisions of R. L. c. 202, § 14, the statute of limitations is a bar to an action upon a promissory note payable upon demand, brought more than six years after its date against one of two makers who has not acknowledged the debt nor promised in writing to pay it, although his joint maker has made payments upon the note within six years before the action was begun. *Fletcher v. Sturtevant*, 249.

Indorser.

If no demand for the payment of a promissory note, payable upon demand, has been made during more than six years after its date upon one who merely signed his name upon its back before its delivery, and who therefore by R. L. c. 73, § 80, is deemed to be an indorser, an action thereafter begun against him upon the note is barred by the statute of limitations, R. L. c. 202, § 2, cl. 1, § 14, although the maker of the note has made payments upon it within six years of the bringing of the action. *Fletcher v. Sturtevant*, 249.

Holder in Due Course.

At the trial of an action by an indorser against the maker of a promissory note where it appeared that the plaintiff, a married woman, became a holder in due course of the note before its maturity, that she indorsed it in blank and delivered it to a corporation to pay an indebtedness owed to it by her but charged upon its books to the name of her husband, that the note was not paid at maturity and was delivered by the corporation to the plaintiff's husband, who "handed" it to the plaintiff, and that the corporation

"charged back" to the husband against certain dividends to which he was entitled the amount of the plaintiff's indebtedness to it, it was held that the plaintiff, as the person in possession of the note with the husband's assent, was entitled to maintain the action in her own name in any event. *Bovarnick v. Davis*, 195.

Payment of Check stopped by Drawer.

The drawer of a check retains the right to countermand its payment at any time before it is paid or is certified and delivered to a *bona fide* holder for value; and, in the absence of an express contract limiting its implied obligation to the drawer, if a bank upon which the check is drawn pays the check after receiving an order to stop its payment, it does so at its peril. *Tremont Trust Co. v. Burack*, 398.

Payment.

Evidence in an action by an indorser against the maker of a promissory note delivered by the plaintiff to a corporation in payment of her indebtedness to the corporation but charged upon its books to her husband upon which it was held that the "charging back" of the amount of the note to the account of the plaintiff's husband with the corporation was not a payment of the note by any one but operated only to discharge the plaintiff's liability to the corporation, so that the plaintiff was remitted to her former rights against the defendant. *Bovarnick v. Davis*, 195.

A post-dated check, given by a merchant to the seller of certain goods, with a statement of a further balance due, in order to gain possession of the goods, which were being held by a carrier under orders of the seller until a sight draft for the purchase price was paid, is not as a matter of law a payment, and, upon the check not being paid, the seller may bring an action for the price of the goods sold and need not sue upon the check as a promissory note. *Bergman v. Granstein*, 378.

BONA FIDE PURCHASER.

Evidence in a suit by a guardian of an insane person to set aside a deed made for a nominal consideration by the insane person conveying certain real estate and another deed made by his grantee for a nominal consideration conveying the same real estate to the insane person and a third person, upon which it was held that the guardian of the insane person was entitled to an injunction against the attaching creditor to restrain the enforcement of his judgment against the land although the attaching creditor was in the position of a purchaser for value. *Brewster v. Weston*, 14.

One, who in good faith and without notice of any fraud on the part of the mortgagor received a mortgage of goods, which was given to him upon his surrendering overdue and unpaid notes previously given to him by the mortgagor for sums lent from time to time before the giving of the mortgage, may maintain an action of tort for conversion of the goods against a sheriff whose deputy had seized and, after a demand by him, had retained the goods upon a writ of replevin brought against the mortgagor by one who had sold the goods to the mortgagor and had rescinded the sale by reason of the mortgagor's fraud. *Entin v. Evans*, 43.

BOND.

In an action by the seller of shares of the capital stock of a corporation against the purchaser and the surety upon a bond of indemnity against the failure of the purchaser to pay a certain note it was held that the existence of the note was a prerequisite to the liability of the surety. *Burdett v. Walsh*, 153.

BOSTON.

A parade on a public street of the city of Boston without a permit required by the board of street commissioners is unlawful. *Commonwealth v. Frishman*, 449.

BOSTON CHAMBER OF COMMERCE.

The Boston Chamber of Commerce is not a business corporation. *Tapper v. Boston Chamber of Commerce*, 209.

Circumstances under which a bill in equity by individual "certificate holding members" of the corporation, Boston Chamber of Commerce, brought in their own behalf and in behalf of others, similarly situated and entitled, who might be permitted to join as plaintiffs, against that corporation, its officers, board of directors and the board of trustees constituted under the provisions of St. 1914, c. 82, is not multifarious. *Ibid.*

Upon a demurrer to a bill in equity which called in question the legality of a vote of the board of directors of the Boston Chamber of Commerce affecting the property of the corporation on the ground that some members of the board were not certificate holding members of the corporation, it was held that such members of the board had a right to vote as directors upon matters affecting the management of the property of the corporation. *Ibid.*

In the same suit it was held that St. 1914, c. 82, which provided for the establishment of a trust and the election, by the board of directors of the corporation, of trustees, and that the money appropriated for the trust "shall be used to purchase the outstanding certificates of the new corporation, or, under the direction of the board of directors, may be invested in other ways. . . . The trustees . . . shall have the power to hold an unlimited number of the certificates of the corporation" empowered the trustees, under the direction of the board of directors, to acquire and hold in the trust fund, besides the "excess certificates," certificates of membership however classified. *Ibid.*

In the same suit it was held that under the new § 21, added to the charter of the Boston Chamber of Commerce by St. 1914, c. 82, which also granted to the trustees, above described, "the power to hold an unlimited number of the certificates of the corporation, and to vote the same and to receive dividends or interest upon the same, any provision of this charter or of the general law to the contrary notwithstanding" it was the duty and personal obligation of the trustees to vote the certificates with sound judgment and a wise regard for the general benefit of the corporation, and that, in the fulfillment of that obligation and the performance of that duty, they were not controlled by the corporation or by its board of directors. *Ibid.*

In the same suit it was held, that the amendment, which gave to the trustees ,

"the power to hold an unlimited number of the certificates of the corporation, and to vote the same . . . any provision of this charter or of the general law to the contrary notwithstanding," was valid and that the trustees might vote such certificates at all meetings of the corporation, including those where only certificate holding members were entitled to vote. *Tapper v. Boston Chamber of Commerce*, 209.

BOSTON CONSOLIDATED GAS COMPANY.

Evidence upon which it was held that after the board of gas and electric light commissioners, acting under the power conferred upon them by St. 1903, c. 417, § 6, had approved of a contract dated September 27, 1917, relating to the sale of gas to the Boston Consolidated Gas Company by the New England Fuel and Transportation Company and the price to be paid therefor no further approval by the board of gas and electric light commissioners or their successors under St. 1919, c. 350, § 117, the commissioners of the department of public utilities, is necessary to make a new price agreed upon by the parties on December 11, 1918, effective between the parties to the contract as of the date, December 11, 1918. *Boston Consolidated Gas Co. v. Department of Public Utilities*, 590.

Under St. 1903, c. 417, § 6, neither the board of gas and electric light commissioners nor their successors, the commissioners of the department of public utilities, have power or jurisdiction to refuse approval of a contract by the Boston Consolidated Gas Company for the purchase of gas if the price to be paid therefor "is less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company." *Ibid*.

Evidence upon which it was held that the board of gas and electric light commissioners, upon a price to be paid by the Boston Consolidated Gas Company to another company for gas being submitted to them for approval under St. 1903, c. 417, § 6, have no power nor jurisdiction to disapprove of the price. *Ibid*.

It further was stated that, in making the foregoing decision, no intimation was made as to the scope and effect of the first part of the second sentence of St. 1903, c. 417, § 6, whereby power is conferred upon the board to determine "from time to time . . . the period or periods during which" the Boston Consolidated Gas Company may purchase its gas at these prices. *Ibid*.

BROKER.

STOCKBROKER, see that title.

CARRIER.

Of Goods.

Where a through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be pre-

Carrier (*continued*).

sumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage . . ." the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and the burden of proving such negligence was upon the shipper. *Florida Cotton Oil Co. v. Clyde Steamship Co.* 10.

Where goods, shipped by water by a through bill of lading, in the course of the shipment are transferred from one carrier to another, any valid limitation of liability contained in the through bill of lading issued by the first carrier enures to the benefit of the second carrier. *Ibid.*

Evidence in an action against carriers who, successively, transported the oil from Florida to Maine under the bill of lading above described for damages resulting from the loss of a part of the oil by leakage while in transit which it was held did not warrant a finding of negligence on the part of either defendant. *Ibid.*

The provisions of St. 1906, c. 463, Part II, §§ 196, 197, do not require that a railroad corporation should give to all persons, engaged in a local express business upon its trains under the conditions specified in § 197, absolutely equal terms, facilities and accommodations regardless of conditions, but require only that as to each such person such terms, facilities and accommodations as the railroad shall make shall be reasonable and equal in view of all the attendant circumstances and conditions. *Director General of Railroads v. Peoples Express, Inc.* 199.

Where a contract of an express company with a railroad contained a provision "That I will not ship or cause to be shipped any articles . . . unless accompanied by a messenger having an express ticket" and the express company repeatedly and deliberately violated this provision, and the Director General of Railroads while in charge of the operation of the railroad corporation, in May, 1919, notified the express company that all its privileges of doing business on the trains of the railroad were terminated and the express company refused to recognize the notice as binding, it was held that the Director General in a suit in equity was entitled to a decree enjoining the corporation from further use of the lines of the railroad in question. *Ibid.*

In the same suit, the express company filed a cross bill seeking a mandatory injunction compelling the Director General to permit it to use the railroad in the course of its business, contending that the regulations in question were discriminatory and unfair to it and this court, in dismissing the cross bill, did so without prejudice to the right of the express company, if any, to apply to the Department of Public Utilities for a revision of the regulation, if so advised. *Ibid.*

A regulation, established by the Boston and Maine Railroad and continued in effect by the Director General of Railroads while in control of that railroad, which required of an express company, doing a local business upon trains of that railroad between Boston and Amesbury and Boston and Newburyport, that all shipments should be forwarded in baggage car service and that an express messenger must accompany each shipment and present for his personal transportation an express ticket, which differed from the ordinary season ticket only in the respect that it might be used by any person acting as messenger, was held to be reasonable and not in violation of the provisions of St. 1906, c. 463, Part II, §§ 196, 197. *Ibid.*

Of Passengers.

St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional. *Burgess v. Mayor & Aldermen of Brockton*, 95.

Where an ordinance enacted before the enactment of St. 1919, c. 371, by the city of Brockton, which had accepted the provisions of St. 1916, c. 293, provided that the licensing authorities might suspend or revoke any license granted for the use of a motor vehicle for hire "for violation of any law of the Commonwealth made in relation to the operation of motor vehicles, or violation of any traffic ordinance of said City . . . or violation of any of the rules, restrictions, requirements or regulations herein prescribed or for any other cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient," it was held that a license granted under the provisions of the ordinance might be revoked without the licensee being given notice or a hearing. *Ibid.*

In the same case it was held that the fact that the licensees had made investments for the conduct of their business in reliance upon a continuance of their business made their licenses no less revocable under the provisions of the ordinance. *Ibid.*

The power, given by the provisions of St. 1916, c. 293, § 1, before the enactment of St. 1919, c. 371, to such cities and towns as should accept its provisions, "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle,[with certain exceptions,]" imposes no obligation upon such municipalities to grant any licenses. *Ibid.*

Actions for personal injuries or death of passengers caused by negligence of street railway and railroad corporations, see appropriate subtitles under NEGLIGENCE.

CHARITY.

A public charitable corporation operating a hospital is not liable in an action of tort for the conscious suffering of one of its patients caused by negligence, either of its managing officers in selecting incompetent servants and employees or of servants or employees selected with care. *Roosen v. Peter Bent Brigham Hospital*, 66.

An action of contract against a public charitable corporation conducting a hospital cannot be maintained by the administrator of the estate of a patient, who suffered consciously and afterwards died in the hospital, upon allegations that the defendant made an oral contract to give to the plaintiff's intestate careful and proper care and treatment and that the intestate's suffering was caused by a breach of the contract and the rendering of "careless and improper care and treatment." *Ibid.*

The provisions of R. L. c. 171, § 2, as amended by St. 1907, c. 375, impose no liability upon a public charitable corporation conducting a hospital for the causing of the death of a patient which resulted either through the negligence of the officers of the defendant in selecting incompetent servants or employees or through negligence of servants or employees carefully selected. *Ibid.*

CITIES AND TOWNS
See MUNICIPAL CORPORATIONS.

CONFLICT OF LAWS.

Upon a bill in equity for instructions by the trustees under a declaration of trust executed in Massachusetts by a single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit. *Greenough v. Osgood*, 235.

Where, at the trial of an action in Massachusetts on a judgment awarded the plaintiff by the Supreme Judicial Court of Maine in a libel for divorce, the laws of Maine relating to actions between husband and wife are not in evidence, the laws of Massachusetts govern. *Golder v. Golder*, 261.

In the absence of proof that the laws of Maine authorize actions between husband and wife, a woman cannot maintain in this State, during the pendency of a libel for divorce brought by her in Maine, an action against her husband upon a judgment of a Maine court for arrearage of alimony ordered to be paid to her *pendente lite*. *Ibid*.

A Massachusetts stockbroker, who has acquired securities under an agreement with a Massachusetts customer, made and to be performed in Massachusetts, whereby the stockbroker is to receive and carry securities as margin for the customer's account, if he fails to carry the securities as margin and uses them for his own purposes, may be charged with their value in an action by the customer for money had and received. *Crehan v. Megargel*, 279.

CONSTITUTIONAL LAW.

Police Power.

St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional. *Burgess v. Mayor & Aldermen of Brockton*, 95.

St. 1912, c. 700, regulating the practice of optometry, is a valid exercise of the police power and violates no provision either of the State or of the Federal Constitution. *Commonwealth v. Houtenbrink*, 320.

Secrecy of Grand Jury Proceedings.

An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to

the charge made against the defendant, comes too late if it is raised for the first time in the form of an offer of proof during the cross-examination of a witness for the Commonwealth at the trial following a general plea of "not guilty" to the indictment, and again is raised by a plea to the jurisdiction of the court filed nearly nine months after conviction. *Commonwealth v. Barronian*, 364.

Statement by RUGG, C. J., of some instances where the presence before a grand jury, while a witness is testifying, of persons other than the witness is lawful because it is necessary in order that the grand jury may ascertain the truth as to the matter under investigation. *Lebowitch, petitioner*, 357.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Ibid.*

An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge made against the defendant, comes too late if it is presented for the first time after a general plea to the indictment, a trial and a verdict of guilty, by motions for leave to withdraw the plea and to file a plea in abatement and other pleadings adapted to raise the question of the legality of the indictment. *Commonwealth v. Homer* 526.

Due Process of Law.

Even constitutional rights of a defendant under indictment, if they do not affect the jurisdiction of the court over the subject matter of the indictment, must be asserted seasonably. *Lebowitch, petitioner*, 357.

The provisions of R. L. c. 220, § 3, in substance requiring that sentence must be imposed, upon conviction of a crime not punishable by death, notwithstanding the pendency of exceptions, unless the trial judge or a justice of the Supreme Judicial Court shall file a certificate that in his opinion there is reasonable doubt whether the judgment should stand, is constitutional. *Ibid.*

Interstate Commerce.

Upon a bill in equity by a corporation organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, the principal business of which was the buying of milk from farmers, transporting it to Boston and there selling it by daily deliveries to retail dealers and consumers, seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, where it appeared that the corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts it was held that the statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution. *H. P. Hood & Sons v. Commonwealth*, 572.

Taxation.

The provisions of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9, and so construed there is nothing in the above statutes violative of the constitutional rights of executors and administrators. *Wheelwright v. Tax Commissioner*, 584.

Taxation of Income of Foreign Corporation.

Upon a bill in equity by a corporation organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, the principal business of which was the buying of milk from farmers, transporting it to Boston and there selling it by daily deliveries to retail dealers and consumers, seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, where it appeared that the corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts it was held that the statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution. *H. P. Hood & Sons v. Commonwealth*, 572.

CONTRACT.

What constitutes.

The circumstances, in an action upon an account annexed for a balance alleged to be due for furniture sold to the defendant and delivered to his daughter, that the father made payments of considerable amounts upon the purchase price of a number of items of furniture for the home of his married daughter and that a few chairs included in the items in the account annexed to the declaration were delivered at his place of business, although important as evidence were held not as a matter of law to be decisive in fixing liability upon the father. *Jackson Caldwell Co. v. Poto*, 58.

Evidence in a suit involving the validity of a certain contract in writing signed without a seal by the president of a corporation with his individual name upon which it was held that the contract was the contract of the corporation. *Director General of Railroads v. Peoples Express, Inc.* 199.

In an action of contract by a corporation upon a contract in writing which contained a provision, "No verbal conditions made by agents will be recognized. Every condition must be specified on the face of this contract" it was held that certain evidence of verbal promises by an agent of the plaintiff relative to the cancellation of the contract properly was excluded, because by the express provision of the contract the plaintiff was not bound by the representation of the agent. *Eastern Advertising Co. v. E. L. Patch Co.* 580.

Consideration.

An oral agreement by a judgment creditor with the judgment debtor to receive a certain sum, less in amount than the judgment debt, in full satisfaction of that judgment debt and also of a judgment debt owed to the creditor by another person, to which the first judgment debtor is a stranger, and to indorse satisfaction in full upon executions which had issued upon both judgments, when the first judgment debtor has made the payment stipulated and the creditor has made the indorsement of full satisfaction upon both executions, is not *nudum pactum*, and a suit in equity by the judgment creditor to enforce the first judgment must be dismissed. *Barnett v. Rosen*, 244.

Validity.

Where a through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be presumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage . . ." the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and the burden of proving such negligence was upon the shipper. *Florida Cotton Oil Co. v. Clyde Steamship Co.* 10.

Evidence in an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as a part of an agreement made upon the third director severing his active connection with the corporation which also provided that the plaintiff should receive the equivalent of one month's salary, \$600, which should "be applied on account of his indebtedness to" the corporation "for unpaid stock subscription," upon which it was held that requests for rulings in effect that, if the plaintiff in good faith believed he had an agreement for continuous employment by the corporation, his termination of the employment at the request of the other two directors was a sufficient consideration to the company for crediting him with \$600, properly were refused. *Moss v. Copelef*, 162.

In the same case it was held that the giving of \$600 to the plaintiff by the corporation was illegal, regardless of the purpose for which it was to be applied. *Ibid.*

An agreement in writing signed by the drawer of a check, upon giving to a bank upon which it was drawn an order to stop its payment, that he would not hold the bank liable "on account of payment contrary to this request if same occur through inadvertence or accident" was held not contrary to public policy and was valid. *Tremont Trust Co. v. Burack*, 398

Construction.

A contract between the town of Oak Bluffs and the Cottage City Water Company which, in a suit in equity by the town to enjoin the company from charging a rate for water supplied to domestic consumers higher than that stated in a schedule annexed to the contract, was held did not fix the rates to be charged to domestic consumers for the entire term of twenty years,

Contract (*continued*).

and permitted the company to raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Oak Bluffs v. Cottage City Water Co.* 18.

Evidence in an action against a stockbroker by a customer for money had and received where it appeared that the plaintiff, desiring to purchase "when, as and if" issued certain shares of stock in a corporation requested an officer of a trust company to transmit the order to the defendant, upon which it was held that a finding was warranted that the contract of the defendant with the plaintiff merely required the defendant to deal with the order of the plaintiff in his usual course of business. *Bendeler v. Lovell*, 133.

The decision in *Moss v. Copelof*, 231 Mass. 513, that a provision in an agreement between three persons, constituting all the directors of a Massachusetts corporation, that, upon one of them severing all active connection with the corporation, he should "be credited with an amount equivalent to one month's salary, namely: Six hundred (600) dollars, which shall be applied on account of his indebtedness to said . . . Company for unpaid stock subscription," did not mean that the \$600 was to be paid to the retiring director but that it should be credited on his account with the corporation, affirmed. *Moss v. Copelof*, 162.

Evidence in the report of an auditor, to whom was referred an action of contract for an alleged breach by the defendant of an agreement to sell and deliver to the plaintiff two thousand barrels of cocoa powder by lot shipments upon which it was held that a judge of the Superior Court, who heard the case upon the auditor's report as the only evidence was warranted in finding that the contract between the parties was not wholly embodied in the letter of confirmation of the plaintiff's order. *Samuels v. W. H. Miner Chocolate Co.* 312.

A contract in writing for the cultivation of land in Florida which was held entire and not divisible. *Potter v. Starratt*, 325.

In an action for breach of a contract in writing whereby the plaintiff deposited in a bank a certain sum to be used by the defendant in the development and cultivation of the defendant's land in Florida it was held that the defendant was under no obligation to account to the plaintiff for money paid to him so long as the defendant was endeavoring in good faith to perform the contract according to its provisions. *Ibid*.

If, in a contract in writing for the sale of a certain quantity of merchandise, the seller is given the option of increasing the quantity of the merchandise to be sold by a certain amount but the contract does not specify a time within which the option shall be exercised, the buyer will not be bound by an exercise of the option which does not occur within a reasonable time. *Chatham Manuf. Co. v. Avery Chemical Co.* 340.

Where a contract in writing made on January 17, 1918, for the sale of five hundred barrels of pyroligneous acid gave the seller an option to increase the number of barrels to twenty-five hundred barrels, but stated no time within which the option should be exercised and it appeared that the acid was for use in dyeing khaki cloth for the use of the national government in the World War, and this was known to the seller and that the seller's average weekly output was seventy-five barrels, it was held, that an exercise

of the option by the seller on August 15, 1918, would not be given within a reasonable time. *Chatham Manuf. Co. v. Avery Chemical Co.* 340.

Letters, following the making of the contract in writing above described, which were held contained no extension of the time within which the seller must exercise the option of increasing the amount of acid to be shipped. *Ibid.*

In the action above described where the plaintiff asked the judge to rule that a letter written by the buyer to the seller on August 8, 1918, asking him to "discontinue shipments of Pyro Acid water until further notice" and subsequent correspondence extended the time within which he could exercise his option to increase the amount to be delivered to twenty-five hundred barrels, and the judge gave the ruling with the qualification that the extension was for a reasonable time thereafter it was held, without intimating that the letter of August 8 did so extend the time for the exercise of the option, that the plaintiff had no reason for complaining of the giving of the qualified ruling. *Ibid.*

In the same action it was held that a letter written by the plaintiff or August 15, under the circumstances above described, to the defendant which after referring to the cause of delay and the correspondence with the defendant, and to the contract as one for three thousand barrels, stated, "We . . . took the matter up with you about June 1st when you stated we could go on and ship. We therefore naturally concluded that the contract was reinstated and that we would be able to ship the above quantity, was not an exercise of the option given to the plaintiff in the contract. *Ibid.*

An exercise of the option above described in a letter of November 20, 1918, was held not to have been within a reasonable time after August 8. *Ibid.*

It was held that the meaning of an agreement between a bank which negligently paid a check and a depositor who had given orders to stop payment of the check was that the bank should be exonerated from liability to the drawer if, through the kind of negligence described, it paid the check after receiving the notice to stop payment. *Tremont Trust Co. v. Burack*, 398.

In a contract for the sale of wash suits, providing for "deliveries to be made about January 15, 1919," and containing a clause, "All orders accepted to be delivered to the best of our ability, but will under no circumstances hold ourselves liable for failure to deliver any portion of orders taken, sometimes caused by circumstances over which we have no control," the word "sometimes" should be interpreted to mean "now and then," "occasionally," "if at any time," and, so interpreted, the clause imposed upon the seller a binding obligation to make deliveries to the best of his ability at the time specified in the agreement unless he was prevented by causes for which he was not responsible and over which he had no control. *Bernstein v. W. B. Manuf. Co.* 425.

In an action of contract by an inventor against a manufacturing corporation for the purchase price of certain letters patent under an agreement in writing that when the corporation shall have paid him \$45,000 he will convey to it certain letters patent it was held that until the payment of the money the option could not be turned into a binding promise to sell and convey the letters patent. *Beaudry v. Hamel Shoe Machinery Co.* 503.

Modification.

Evidence in an action by a purchaser against a seller for damages resulting from a breach of contract for the purchase of goods upon thirty days' credit, to be delivered in August and September upon which the judge found that the time of delivery had been changed by mutual agreement and found for the plaintiff, and it was held, that the findings were warranted. *Ginz v. Axelrod*, 143.

Evidence in an action of contract to recover the contract price of a quantity of sauerkraut where it appeared that, by a contract in writing dated February 11 of a certain year, the plaintiff agreed to sell and the defendant to purchase one hundred barrels of sauerkraut "F. O. B. Phelps," "to be ordered out" by the defendant between the next October 1 and November 30, upon which it was held that although, under the contract, title would not have passed until the sauerkraut was delivered. "F. O. B. Phelps," a proposal of the defendant made on January 4, that the plaintiff should "Hold goods in your storage until we advise you further" and the acceptance by the plaintiff of this proposal on January 6, operated as waivers of the obligation of the defendant to order out, and of the plaintiff to make delivery "F. O. B. Phelps" as a condition of the passing of title. *Empire State Pickling Co. v. Empire Grocery Co.* 418.

Performance and Breach.

An action of contract against a public charitable corporation conducting a hospital cannot be maintained by the administrator of the estate of a patient, who suffered consciously and afterwards died in the hospital, upon allegations that the defendant made an oral contract to give to the plaintiff's intestate careful and proper care and treatment and that the intestate's suffering was caused by a breach of the contract and the rendering of "careless and improper care and treatment." *Roosen v. Peter Bent Brigham Hospital*, 66.

Evidence in an action against a stockbroker by a customer for money had and received where it appeared that the plaintiff, desiring to purchase certain shares of stock in a corporation, requested an officer of a trust company to transmit the order to the defendant upon which it was held that a finding was warranted that the defendant had fulfilled his part of the contract. *Bendslev v. Lovell*, 133.

In the same action it was held that, a finding being warranted that the plaintiff had failed to show a breach of contract by the defendant, a finding for the defendant was warranted. *Ibid.*

Evidence in an action by a purchaser against a seller for damages resulting from a breach of contract to deliver goods upon thirty days' credit, upon which a judge found that the time of delivery had been changed by mutual agreement and found for the plaintiff, and it was held that the findings were warranted. *Ginz v. Axelrod*, 143.

Evidence in an action by the owner of shares of the capital stock of a corporation against the purchaser and a surety company which had executed a bond to indemnify the seller "in the event of the failure" of the purchaser to pay upon a note given by the purchaser in payment for the

shares which it was held that the existence of the note was a prerequisite to the liability of the surety. *Burdett v. Walsh*, 153.

A Massachusetts stockbroker, who has acquired securities under an agreement with a Massachusetts customer, made and to be performed in Massachusetts, whereby the stockbroker is to receive and carry securities as margin for the customer's account, if he fails to carry the securities as margin and uses them for his own purposes, may be charged with their value in an action by the customer for money had and received. *Crehan v. Megargel*, 279.

In an action against a stockbroker by a customer for breach of an agreement to receive, buy and sell, and carry securities on margin, the burden rests on the stockbroker to prove that he had in his possession or control at all times, available for delivery to the plaintiff, the securities which he purported to be carrying for him. *Ibid*.

Evidence in the report of an auditor, to whom was referred an action of contract for an alleged breach by the defendant of an agreement to sell and deliver to the plaintiff two thousand barrels of cocoa powder by lot shipments upon which it was held that the judge was warranted in finding that the plaintiff had broken the contract, that the breach went to its essence, that the cancellation by the defendant was warranted; and in finding for the defendant. *Samuels v. W. H. Miner Chocolate Co.* 312.

At the trial of an action for breach of a contract in writing to employ the plaintiff as general manager of a store, the plaintiff agreeing to give "all his undivided time and attention exclusively to the said business," where it appeared that the defendant had discharged the plaintiff during the term specified in the contract, and the defendant introduced evidence tending to show justification for the discharge in the fact that the plaintiff had disobeyed certain orders given to him by the defendant and there was evidence of the plaintiff tending to show, as to some of the orders, that he had not received them, and, as to another, that his alleged act of disobedience preceded the giving of the order, a motion of the defendant for the ordering of a verdict in his favor was denied and it was held that the denial of the motion was right. *Hanneman v. Shlizek & Sons, Inc.* 317.

Evidence in an action of contract to recover the contract price of a quantity of sauerkraut where it appeared that, by a contract in writing dated February 11 of a certain year, the plaintiff agreed to sell and the defendant to purchase one hundred barrels of sauerkraut "F. O. B. Phelps," "to be ordered out" by the defendant between the next October 1 and November 30, upon which it was held that a finding "that title passed" and for the plaintiff was warranted. *Empire State Pickling Co. v. Empire Grocery Co.* 418.

In an action of contract by an inventor against a manufacturing corporation for the purchase price of certain letters patent under an agreement in writing it was held that the declaration did not set out any breach of the written agreement by the defendant and that a demurrer was sustained rightly. *Beaudry v. Hamel Shoe Machinery Co.* 503.

Damages to be assessed for breaches of contracts, see appropriate subtitle under DAMAGES.

In Writing.

An order in writing for goods, signed by the purchaser and containing provisions that no goods should be returned without permission of the seller,

Contract (continued).

that no agreements other than those written on the order would be recognized and that verbal agreements with the salesman would not be recognized, is complete and free from ambiguity, and is unaffected by a memorandum on the order made by a salesman for the plaintiff at the time of signing the order requesting the plaintiff to advise the defendant whether an exchange of certain goods, that formerly had been purchased of the plaintiff and then were held by the defendant in his store, could be made for the goods described in the order. *Benford Manuf. Co. v. Standard Tire & Rubber Co.* 380.

Where, by a formal bill of sale and conveyance under seal, the owner of "All brick of every name, nature and description located" on certain property for the stated consideration of \$4,000 conveyed the bricks, thus described, to one who paid therefor \$1,000 in cash and \$3,000 by a promissory note, the instrument containing a covenant and warranty of title but no warranty of representation as to quality, it is not open to the purchaser, in an action against him by the seller upon the promissory note, to contend that there had been on the part of the seller a breach of warranty of quality, for which the purchaser sought damages in recoupment. *Bennett v. Thomson*, 463.

Evidence in an action by a corporation upon a contract in writing, upon which it was held, that the contract was executed by the plaintiff and was approved by its treasurer in writing. *Eastern Advertising Co. v. E. L. Patch Co.* 580.

In an action of contract by a corporation upon a contract in writing which contained a provision, "No verbal conditions made by agents will be recognized. Every condition must be specified on the face of this contract" it was held that certain evidence of verbal promises by an agent of the plaintiff relative to the cancellation of the contract properly was excluded, because by the express provision of the contract the plaintiff was not bound by the representation of the agent. *Ibid.*

Implied.

The circumstances, in an action upon an account annexed for a balance alleged to be due for furniture sold to the defendant and delivered to his daughter, that the father made payments of considerable amounts upon the purchase price of a number of items of furniture for the home of his married daughter and that a few chairs included in the items in the account annexed to the declaration were delivered at his place of business, although important as evidence were held not as a matter of law to be decisive in fixing liability upon the father. *Jackson Caldwell Co. v. Poto*, 58.

An assignee of a right of action upon an account for goods sold, who gave no notice of the assignment to the debtor, cannot maintain an action for money had and received against one to whom his assignor, after the assignment to him, for a valid consideration assigned the same right of action and who, in good faith and without knowledge of the first assignment, in his own right as assignee received the amount of the debt from the debtor. *Rabinowitz v. People's National Bank*, 102.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to

arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. *Vaughan v. Mansfield*, 147.

In the same action it also was held that a ruling asked for by the defendant that if "the husband furnishes the wife with sufficient means or money to provide her with what is reasonably necessary for her support and comfort, then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts" properly was refused. *Ibid.*

Building Contract.

Where an action by a building contractor upon a contract in writing for the construction of a building for the defendant was heard by a judge without a jury upon an auditor's report and evidence both oral and documentary, and the judge found that a requirement of the contract, that final payment should be made only upon certificate of the architect, was waived by the parties and found for the plaintiff, refusing to grant rulings, asked for by the defendant, that on all the evidence he should find for the defendant, that there was no evidence of any waiver of the contract by either party, and that the plaintiff, having failed to furnish an architect's certificate that the contract had been completed, could not recover, exceptions by the defendant which do not include a report of all the evidence must be overruled. *James Elgar, Inc. v. Newhall*, 373.

Where at the hearing of the action above described, the defendant contended that certain mahogany furnished by the plaintiff did not satisfy the requirements of samples furnished by the plaintiff, and the judge so found; but he also found that the defects in the mahogany were remedied to the satisfaction of the defendant, and refused to grant a request by the defendant for a ruling that, because the mahogany was not in accordance with the sample, the plaintiff could not recover, and the defendant alleged exceptions, it was held that, in the absence of a report of all the evidence, the exceptions must be overruled. *Ibid.*

Where at the hearing of the action above described, it appearing that there was a delay in the completion of the contract beyond the time permitted by its provisions, and the judge found that it did not appear that the delay was due to any failure on the plaintiff's part to figure the size and "determination" of material from the plan and specifications, and refused to give a ruling, asked for by the defendant, that the defendant was "not liable for any delays occasioned by the plaintiff in its factory, as the size and determination of all material could have been figured from the plan and specifications," it was held that the refusal of the ruling was proper. *Ibid.*

Evidence at the hearing of the case above described, upon which the judge found that the provision of the contract relating to the presentation by the plaintiff to the architect of a claim for an extension of time was waived by the parties, and that the defendant did not so furnish all labor and materials essential to the conduct of the plaintiff's work as not to delay its progress, and assessed damages therefor and upon which it was held that an exception to the refusal to rule as requested that, "The contract being silent as to the length of time in which the work covered by the contract was to be completed, the plaintiff cannot recover damages on account of delay caused by other contractors," must be overruled. *Ibid.*

For Water Supply.

A contract between the town of Oak Bluffs and the Cottage City Water Company which, in a suit in equity by the town to enjoin the company from charging a rate for water supplied to domestic consumers higher than that stated in a schedule annexed to the contract, was held did not fix the rates to be charged to domestic consumers for the entire term of twenty years and permitted the company to raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Oak Bluffs v. Cottage City Water Co.* 18.

Of Employment.

At the trial of an action for breach of a contract in writing to employ the plaintiff as general manager of a store, the plaintiff agreeing to give "all his undivided time and attention exclusively to the said business," where it appeared that the defendant had discharged the plaintiff during the term specified in the contract, and the defendant introduced evidence tending to show justification for the discharge in the fact that the plaintiff had disobeyed certain orders given to him by the defendant and there was evidence of the plaintiff tending to show, as to some of the orders, that he had not received them, and, as to another, that his alleged act of disobedience preceded the giving of the order, a motion of the defendant for the ordering of a verdict in his favor was denied and it was held, that the denial of the motion was right. *Hanneman v. Shivek & Sons, Inc.* 317.

CONVERSION.

One, who in good faith and without notice of any fraud on the part of the mortgagor received a mortgage of goods, which was given to him upon his surrendering overdue and unpaid notes previously given to him by the mortgagor for sums lent from time to time before the giving of the mortgage, may maintain an action of tort for conversion of the goods against a sheriff whose deputy had seized and, after a demand by him, had retained the goods upon a writ of replevin brought against the mortgagor by one who had sold the goods to the mortgagor and had rescinded the sale by reason of the mortgagor's fraud. *Entin v. Evans*, 43.

A Massachusetts stockbroker has the legal title to securities acquired by him under a contract, made with a customer who is a resident of Massachusetts and to be performed here, by the provisions of which the stockbroker is to receive, buy, sell and carry securities on margin; and, the customer being without a right to immediate possession, the stockbroker, if he uses the securities for his own purposes, is not liable to the customer in an action of tort for conversion. *Crehan v. Megargel*, 279.

CORPORATION.

By-laws.

Upon a demurrer to a bill in equity which called in question the legality of a vote of the board of directors of the Boston Chamber of Commerce affecting

the property of the corporation on the ground that some members were not certificate holding members of the corporation, it was held that such members of the board had a right to vote as directors upon matters affecting the management of the property of the corporation. *Tapper v. Boston Chamber of Commerce*, 209.

Officers and Agents.

Evidence in an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as a part of an agreement made upon the third director severing his active connection with the corporation upon which it was held that requests for rulings based on the assumption that the plaintiff had a contract with the corporation for continuous employment properly were refused. *Moss v. Copelaf*, 162.

Evidence in a suit involving the validity of a certain contract in writing signed without a seal by the president of a corporation with his individual name upon which it was held that the contract was the contract of the corporation. *Director General of Railroads v. Peoples Express, Inc.* 199.

Upon a demurrer to a bill in equity which called in question the legality of a vote of the board of directors of the Boston Chamber of Commerce affecting the property of the corporation on the ground that some members of the board were not certificate holding members of the corporation, it was held that such members of the board had a right to vote as directors upon matters affecting the management of the property of the corporation. *Tapper v. Boston Chamber of Commerce*, 209.

In the same suit it was held that St. 1914, c. 82, which provided for the establishment of a trust and the election, by the board of directors of the corporation, of trustees and that the money appropriated for the trust "shall be used to purchase the outstanding certificates of the new corporation, or, under the direction of the board of directors, may be invested in other ways. . . . The trustees . . . shall have the power to hold an unlimited number of the certificates of the corporation" empowered the trustees, under the direction of the board of directors, to acquire and hold in the trust fund, besides the "excess certificates," certificates of membership however classified. *Ibid.*

In the same suit it was held that under the new § 21, added to the charter of the Boston Chamber of Commerce by St. 1914, c. 82, which also granted to the trustees, above described, "the power to hold an unlimited number of the certificates of the corporation, and to vote the same and to receive dividends or interest upon the same, any provision of this charter or of the general law to the contrary notwithstanding" it was the duty and personal obligation of the trustees to vote the certificates with sound judgment and a wise regard for the general benefit of the corporation, and that, in the fulfilment of that obligation and the performance of that duty, they were not controlled by the corporation or by its board of directors. *Ibid.*

In the same suit it was held that the amendment, which gave to the trustees "the power to hold an unlimited number of the certificates of the corporation, and to vote the same . . . any provision of this charter or of the general law to the contrary notwithstanding," was valid and that the trustees might vote such certificates at all meetings of the corporation, includ-

Corporation (*continued*).

ing those where only certificate holding members were entitled to vote. *Tapper v. Boston Chamber of Commerce*, 209.

Evidence in an action by a corporation upon a contract in writing, upon which it was held, that the contract was executed by the plaintiff and was approved by its treasurer in writing. *Eastern Advertising Co. v. E. L. Patch Co.* 580.

Liability of Directors.

Evidence in an action of deceit by a purchaser of shares of preferred stock of a corporation against a director of the corporation for damages alleged by him to have resulted from false representations inducing him to purchase the stock, one of such false representations being that such issue of preferred stock was valid, upon which it was held that such representation was true because the issue of preferred stock was valid. *Beaman v. Gerrish*, 79.

A purchaser of shares of the capital stock of a corporation cannot maintain against a director of the corporation an action of tort for deceit to recover damages alleged to have been suffered by him by reason of false statements contained in returns made by the corporation to the commissioner of corporations, as required by St. 1903, c. 437, §§ 45, 46, which were signed and sworn to by the director, where it does not appear that the director ever had any relations with the purchaser before the sale of the stock, or that the director signed the statements with knowledge of their falsity or without belief in their truth or in reckless carelessness as to whether they were true or false. *Ibid.*

Validity of Issue of Shares.

Evidence in an action of deceit by a purchaser of shares of preferred stock of a corporation against a director of the corporation for damages alleged by him to have resulted from false representations inducing him to purchase the stock, one of such false representations being that such issue of preferred stock was valid, upon which it was held that such representation was true because the issue of preferred stock was valid. *Beaman v. Gerrish*, 79.

Rights of Minority Stockholder.

A demurrer to a bill in equity by a minority stockholder, who also is one of eight directors of a Massachusetts corporation, against the corporation and the other seven directors, who include all the officers of the corporation, to enjoin the defendants from carrying out certain votes, passed by the seven defendant directors against the objection and vote of the plaintiff, will be overruled where, from the allegations of the bill, it appears that four of the seven individual defendants conspired with the other three to deprive and to defraud the plaintiff of her rights as a stockholder and adopted the votes in pursuance of that purpose. *Almy v. Almy, Bigelow & Washburn, Inc.* 227.

It was not necessary for the plaintiff, before commencing the suit above described, to apply to the corporation to bring suitable action against the individual defendants because it appears from the facts alleged in the bill and admitted by the demurrer that such application would have to be

made to the defendants to take action against themselves and either would be futile and unavailing or would result in the authors of the wrong conducting litigation in the name of the corporation against themselves, which would be contrary to the established principles of justice. *Almy v. Almy, Bigelow & Washburn, Inc.* 227.

Where it appeared, from allegations in the bill in equity above described that the plaintiff was present at the meeting when the objectionable votes were passed and that she protested and voted against them, and, within six months thereafter, brought the suit, it was held that the plaintiff showed proper diligence in asserting her rights. *Ibid.*

Resulting Trust in Shares issued upon Incorporation.

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that the identity of the shares of stock, standing in the name of the plaintiff's husband and of his nominee, as representing what previously was her property, was established. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it also was held that the circumstance that property of the husband in an outside venture, which proved valueless, was part of the consideration for the shares issued to him was of no consequence. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it also was held that a decree should be entered directing that the shares of stock in the corporation which had stood in the name of the husband and his nominee should be conveyed to the plaintiff, and that there should be an accounting to her for dividends received thereon. *Ibid.*

Returns to Commissioner of Corporations.

A purchaser of shares of the capital stock of a corporation cannot maintain against a director of the corporation an action of tort for deceit to recover damages alleged to have been suffered by him by reason of false statements contained in returns made by the corporation to the commissioner of corporations, as required by St. 1903, c. 437, §§ 45, 46, which were signed and sworn to by the director, where it does not appear that the director ever had any relations with the purchaser before the sale of the stock, or that the director signed the statements with knowledge of their falsity or without belief in their truth or in reckless carelessness as to whether they were true or false. *Beaman v. Gerrish*, 79.

Taxation.

See TAX, Corporation.

Reorganization.

If the directors of a business corporation, incorporated under the laws of the State of Maine and having a usual place of business in this Commonwealth, which has outstanding both preferred and common stock, cause to be or-

Corporation (*continued*).

ganized under the laws of the State of Maine another corporation, issuing common stock only, and all of the stockholders, both preferred and common, of the original corporation exchange their shares for shares of stock of the new corporation, after which the original corporation transfers all its property to the new corporation, which continues the business as before; and if an inhabitant of this Commonwealth, who owned shares of the preferred and of the common stock of the original corporation, exchanged them for shares of stock of the new corporation, which were of greater value, such transaction is a sale of the shares in the original, and a purchase of the shares in the new corporation and the gain resulting therefrom is subject to a tax under St. 1916, c. 269, § 5 (c). *Osgood v. Tax Commissioner*, 88.

Circumstances under which it was held that an exchange of shares of stock in one New York corporation, by an inhabitant of Massachusetts, share for share, for shares in another New York corporation, of a much larger capitalization, which was organized to acquire the common stock of four corporations engaged in the manufacturing of products which could be conducted more economically under a single management, and issued substantially all of its capital stock for that purpose, was a sale and purchase of intangible personal property under St. 1916, c. 269, § 5 (c), and that the gain resulting therefrom was subject to the income tax imposed by that statute. Following *Osgood v. Tax Commissioner*, *ante*, 88. *Stone v. Tax Commissioner*, 93.

Charitable.

A public charitable corporation operating a hospital is not liable in an action of tort for the conscious suffering of one of its patients caused by negligence, either of its managing officers in selecting incompetent servants and employees or of servants or employees selected with care. *Roosen v. Peter Bent Brigham Hospital*, 66.

An action of contract against a public charitable corporation conducting a hospital cannot be maintained by the administrator of the estate of a patient, who suffered consciously and afterwards died in the hospital, upon allegations that the defendant made an oral contract to give to the plaintiff's intestate careful and proper care and treatment and that the intestate's suffering was caused by a breach of the contract and the rendering of "careless and improper care and treatment." *Ibid*.

The provisions of R. L. c. 171, § 2, as amended by St. 1907, c. 375, impose no liability upon a public charitable corporation conducting a hospital for the causing of the death of a patient which resulted either through the negligence of the officers of the defendant in selecting incompetent servants or employees or through negligence of servants or employees carefully selected. *Ibid*.

Municipal Corporations.

See that title.

Foreign.

Upon a bill in equity by a corporation organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, the principal business of which was the buying of milk from farmers, trans-

porting it to Boston and there selling it by daily deliveries to retail dealers and consumers, seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, where it appeared that the corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts it was held that by the provisions of § 3 of the statute, income derived by the corporation from sales of milk and other articles either outside of Massachusetts or by direct shipment from outside of Massachusetts to its customers within the Commonwealth was not subject to taxation. *H. P. Hood & Sons v. Commonwealth*, 572.

Evidence in the above described suit upon which it was held that the corporation ceased to be engaged in interstate commerce as to the milk when, after its arrival in Boston, it changed the method of dealing with and disposing of it. *Ibid.*

Evidence in the suit above described upon which it was held that the transactions with the milk after its arrival in Boston were domestic transactions, and net income derived therefrom was subject to the tax imposed by the statute. *Ibid.*

In the above described suit it was held that the statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution. *Ibid.*

COSTS.

See appropriate subtitle under PRACTICE, CIVIL.

COTTAGE CITY WATER COMPANY.

In the suit above described it was held that the rates to be charged to domestic consumers were not fixed by the contract for the entire term of twenty years, and that the company might raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Oak Bluffs v. Cottage City Water Co.* 18.

In a suit in equity by the town of Oak Bluffs against the Cottage City Water Company, organized under St. 1890, c. 151, to enjoin the defendant from charging for water supplied to domestic consumers in the town a rate higher than that stated in the schedule annexed to an agreement between the town and the company, made in 1910, the plaintiff alleged and contended that the agreement provided that the rate stated in its schedules should be maintained by the defendant unchanged for twenty years, and, in determining the case, it was assumed, without so deciding, that the town had authority to enter into a proper contract with the company respecting water rates to be charged for domestic consumption. *Ibid.*

CUSTOM.

Evidence in an action against a railroad company for personal injuries caused by a bundle of newspapers, pushed from a baggage car by an employee of the defendant, falling upon the plaintiff, who was at the door

Custom (*continued*).

of the car to receive the papers for his employer, which it was held warranted a finding that the plaintiff, when injured, was at the baggage car door with the rights of one invited by the defendant to be there. *Belyea v. New York, New Haven, & Hartford Railroad*, 225.

DAMAGES.

For Property taken or damaged under Statutory Authority.

Evidence at the hearing of a petition for the assessment of damages resulting from the taking of a portion of a farm of the petitioner for the construction of a State highway, upon which it was held that the frontage on a better and more desirable road and the more convenient access to a village were elements of benefit which were direct and special and could be set off in damages against the petitioner, even if all the real estate in the vicinity which abutted on the new highway was benefited similarly. *Hall v. Commonwealth*, 1.

At the trial above described a special question submitted by the judge to the jury "Did the building and maintenance of the road confer upon the estates in the neighborhood generally a benefit or benefits of a sort common to them all?" was appropriately expressed and the use of the word "all" was not erroneous. *Ibid.*

For Breach of Contract.

Evidence on the issue of damages in an action for breach of a contract in writing to employ the plaintiff as general manager of a store, upon which it was held that a question asked of the plaintiff, "How did it happen you incurred expenses before beginning your connection with" the merchant's store? referring to a store in which the plaintiff worked after leaving the defendant, was competent, as the plaintiff had a right to show that the money paid to him by the merchant was not for services and, therefore, should not be considered in mitigation of damages. *Hanneman v. Shlivek & Sons, Inc.* 317.

Evidence in an action of contract to recover the contract price of a quantity of sauerkraut where it appeared that, by a contract in writing dated February 11 of a certain year, the plaintiff agreed to sell and the defendant to purchase one hundred barrels of sauerkraut "F. O. B. Phelps," "to be ordered out" by the defendant between the next October 1 and November 30 upon which it was held that the defendant was obligated under St. 1908, c. 237, § 51, to pay the contract price and the storage and insurance charges. *Empire State Pickling Co. v. Empire Grocery Co.* 418.

In Tort.

In an action of tort at common law by one employed on a ship as ship's cook and seaman, against the owner of the vessel for personal injuries received when boarding his ship in tidewater by reason of the breaking of a defective ratline, it was held that the plaintiff was entitled to recover full compensatory damages. *Proctor v. Dillon*, 538.

DEATH.

Actions for death by wrongful act, see NEGLIGENCE, *Causing Death*.

Declarations of deceased persons as evidence, see appropriate subtitle under EVIDENCE.

DECEIT.

A purchaser of shares of the capital stock of a corporation cannot maintain against a director of the corporation an action of tort for deceit to recover damages alleged to have been suffered by him by reason of false statements contained in returns made by the corporation to the commissioner of corporations, as required by St. 1903, c. 437, §§ 45, 46, which were signed and sworn to by the director, where it does not appear that the director ever had any relations with the purchaser before the sale of the stock, or that the director signed the statements with knowledge of their falsity or without belief in their truth or in reckless carelessness as to whether they were true or false. *Beaman v. Gerrish*, 79.

Evidence in an action of deceit by a purchaser of shares of preferred stock of a corporation against a director of the corporation for damages alleged by him to have resulted from false representations inducing him to purchase the stock, one of such false representations being that such issue of preferred stock was valid, upon which it was held that such representation was true because the issue of preferred stock was valid. *Ibid*.

Evidence at the trial of an action upon a promissory note given as consideration by the purchaser to the seller of certain brick under a formal bill of sale upon which it was held that a finding would not have been warranted that the plaintiff made fraudulent statements which induced the defendant to purchase the brick and upon which the defendant relied; and, therefore, that the verdict for the plaintiff rightly was ordered. *Bennett v. Thomson*, 463.

DEED.

Description.

A description of land in a certain city in an assessment of it for taxes, in an advertisement of it for sale for unpaid taxes and in a deed of it to the purchaser at the sale is sufficiently definite and accurate if it is by reference to a lot by number on a certain plan recorded in the office of the assessor of taxes but not in the registry of deeds. *Larsen v. Dillenschneider*, 56.

Validity.

A deed by an insane person is ineffectual to convey a title to land which is good against the grantor or his heirs or devisees unless it later is confirmed by the grantor when of sound mind, or by his legally constituted guardian or, after his death, by his heirs or devisees. *Brewster v. Weston*, 14.

Evidence in a suit by a guardian of an insane person to set aside a deed made for a nominal consideration by the insane person conveying certain real estate and another deed made for a nominal consideration by his grantee

Deed (*continued*).

to the insane person and a third person conveying the same real estate upon which it was held that although an attaching creditor of the third person was in the position of a purchaser for value, he obtained by his attachment no greater right than the judgment debtor had, and, the insane person's deed being voidable as to the judgment debtor, was voidable as to the attaching creditor and should be declared void. *Brewster v. Weston*, 14.

A deed by a married woman in 1865 of her interest in land owned by herself and others as tenants in common is void if her husband did not join therein nor assent to it in writing. *Nickerson v. Nickerson*, 348.

Construction.

Where land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title, and the widow died in 1889, leaving surviving her husband and children of their union and the husband died in 1900, it was held that the deed of the husband in 1863 conveyed a freehold in the land for his life, leaving rights in reversion in the heirs of his wife. *Nickerson v. Nickerson*, 348.

DEPARTMENT OF PUBLIC UTILITIES.

Evidence upon which it was held that after the board of gas and electric light commissioners, acting under the power conferred upon them by St. 1903, c. 417, § 6, had approved of a contract dated September 27, 1917, relating to the sale of gas to the Boston Consolidated Gas Company by the New England Fuel and Transportation Company and the price to be paid therefor no further approval by the board of gas and electric light commissioners or their successors under St. 1919, c. 350, § 117, the commissioners of the department of public utilities, is necessary to make a new price agreed upon by the parties on December 11, 1918, effective between the parties to the contract as of the date, December 11, 1918. *Boston Consolidated Gas Co. v. Department of Public Utilities*, 590.

Evidence upon which it was held that neither the board of gas and electric light commissioners nor their successors, the commissioners of the department of public utilities, upon a price to be paid by the Boston Consolidated Gas Company to another company for gas being submitted to them for approval under St. 1903, c. 417, § 6, have no power nor jurisdiction to disapprove of the price. *Ibid.*

It was stated that it is not to be inferred from the foregoing decision that the department of public utilities, by the approval of a contract or otherwise, may bind itself not to exercise at all times the functions vested in it by Sts. 1903, c. 417, § 6; 1919, c. 350, § 117. *Ibid.*

It further was stated, that, in making the foregoing decision, no intimation was made as to the scope and effect of the first part of the second sentence of St. 1903, c. 417, § 6, whereby power is conferred upon the board to determine "from time to time . . . the period or periods during which" the Boston Consolidated Gas Company may purchase its gas at these prices. *Ibid.*

DEVISE AND LEGACY.

Time of Vesting.

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department to be called the "Pratt School of Naval Architecture and Marine Engineering" under which it was held in a suit in equity for the sale of real estate by the residuary devisee that the trust estate vested in the Institute with the receipt of the funds. *Massachusetts Institute of Technology v. Attorney General*, 288.

Identity of Legatee.

Where in a will, from the provisions of which it was clear that the purpose of the testator was to found and endow a school of naval architecture and marine engineering, the only provision touching directly upon the nature of instruction to be given in the school read, "and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance" it was held that it was plain that the word "insurance" was used inadvertently, and should be stricken out. *Massachusetts Institute of Technology v. Attorney General*. 288.

Charity.

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department to be called the "Pratt School of Naval Architecture and Marine Engineering" which was held constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust. *Massachusetts Institute of Technology v. Attorney General*, 288.

In the same suit it was held that a direction to erect a memorial of bronze in the interior of the building was a mere incident in the construction of the building; and the testator's motive to commemorate himself and family did not prevent the main purpose from being charitable. *Ibid.*

In the same suit it was held that the manifest intent of the testator was to give the entire rest and residue of his estate to the charitable purpose defined in the will, subject only to the limitation that it should not be paid until it and the accumulated income reached the limit set, \$750,000, within twenty-one years after his decease. *Ibid.*

Rule against Perpetuities.

See PERPETUITIES, RULE AGAINST.

DISTRICT ATTORNEY.

If a district attorney, in his closing argument at the trial of an indictment, makes an untrue statement of law, the attention of the judge should be

District Attorney (*continued*).

called thereto at once; and an exception to a refusal to grant a request, presented after the close of the argument, for an instruction that the statement was not a true statement of the law, must be overruled. *Commonwealth v. Homer*, 526.

Where without producing any record of bankruptcy a district attorney at the trial of an indictment for robbery was allowed to cross-examine the defendant as to whether he had filed a petition in bankruptcy several years before the robbery, it was stated that such a method of cross-examination was highly prejudicial to the defendant, and that, irrespective of whether the district attorney believed that a petition in bankruptcy had been filed, an unfair advantage was taken of the defendant in putting the questions. *Ibid.*

Where at the trial above described the district attorney was permitted to ask a witness in cross-examination a series of questions as to whether, on sundry occasions, knowledge had come to her that "the authorities" were making an inquiry as to the defendant "selling dope" and all answers were in the negative, without determining whether the exceptions to the evidence should be sustained, this court stated that the method of cross-examination was highly improper and prejudicial to the defendant, being an attempt by unfair means to belittle him and render him unworthy of respect or credit. *Ibid.*

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

A wife's inchoate right of dower in real estate of her husband gives her no right to maintain a bill in equity to redeem real estate of his from a mortgage made by him in which she did not join. *Ryder v. Brockton Savings Bank*, 476.

A wife, who, for the purpose of releasing her rights of dower and homestead and rights given her by statute, joined with her husband in a mortgage of real estate owned by him, may maintain a bill in equity to redeem the real estate from the mortgage. *Ibid.*

DUMB-WAITER.

The provisions of R. L. c. 104, § 27, relating to the construction of elevator cabs or cars used for freight or passengers and to safety appliances connected with their operation, do not apply to a dumb-waiter used in a retail dry goods establishment for carrying small parcels from the second floor to the shipping department in the basement. *Cullity v. Johnson*, 137.

EASEMENT.

Evidence in a suit to enjoin the maintenance of a barway as an obstruction to a right of way upon which it was held that the inference was warranted that both of the adjoining owners understood and mutually agreed that the way should be located at the place shown by the gate and the barway. *Dunham v. Dodge*, 367.

Evidence in the above described suit upon which it was held that a barway ten and eighteen one hundredths feet in width erected by the owner of the westerly farm to give access to and from the way, properly may be found not to be of sufficient width. *Dunham v. Dodge*, 367.

Where a right of way from a farm across an adjoining farm to and from a public way was given by deed without limitation or reservation and the width of the way was not defined, the easement was to the use of a way of reasonable width; and, in determining what is a reasonable width, the character and configuration of the land, the purposes for which the land and the way were used at the time of the grant, and all the circumstances attending the grant are to be considered. *Ibid*.

The provisions of Sts. 1861, c. 100; 1874, c. 372, § 107; Pub. Sts. c. 112, § 215; R. L. c. 111, § 271; St. 1906, c. 463, Part II, § 80, prevent the acquiring, by the owner of land adjoining a railroad location, of a title by adverse possession to the whole or to any part of the location or to an easement therein of support for structures on the adjoining owner's land. *Hurlbut Rogers Machinery Co. v. Boston & Maine Railroad*, 402.

ELEVATOR.

The provisions of R. L. c. 104, § 27, relating to the construction of elevator cabs or cars used for freight or passengers and to safety appliances connected with their operation, do not apply to a dumb-waiter used in a retail dry goods establishment for carrying small parcels from the second floor to the shipping department in the basement. *Cullity v. Johnson*, 137.

EMPLOYER'S LIABILITY.

See appropriate subtitle under NEGLIGENCE.
See also WORKMEN'S COMPENSATION ACT.

EQUITABLE RESTRICTIONS.

Evidence in a suit in equity to enjoin the defendant from violating an equitable restriction by maintaining a stable on land adjoining the plaintiff's land upon which it was held, that the plaintiff was not prevented from maintaining the suit by laches, waiver or acquiescence. *O'Keefe v. Sheehan*, 390.

In the above described suit a master to whom the suit was referred found in substance that the evidence upon the question whether the stable was "in the nature of a nuisance" was "not very complete nor very satisfactory," that "it could hardly be otherwise," and that he could not see "how any one can tell how this will be until a fair trial of the new arrangements is given" and it was held that the negative findings of the master upon the question whether the defendant's use of the premises was a nuisance required that the bill be dismissed without prejudice and without costs. *Ibid*.

EQUITY JURISDICTION.

He who seeks Equity must do Equity.

One who is occupying real estate under a lease in writing cannot maintain a suit in equity to enjoin the lessor from compelling him to vacate the premises in accordance with a condition in the lease giving the lessor a right of re-entry upon a failure of the lessee to pay rent as called for by the lease, where it appears that the plaintiff's failure to pay his rent when due was so settled a habit as to be described rightly as a general course of conduct and that the circumstances of continued delay were annoying in nature and were accompanied by frequent drawing of checks when there were no funds to meet them. *Darnirris v. Boston Safe Deposit & Trust Co.* 76.

Plaintiff must come into Court with Clean Hands.

In a suit in equity by a lessee to enjoin a lessor from tearing down the leased premises and erecting a new building where there was evidence that the lessee orally agreed with the lessor to surrender possession of the leased premises and to accept other premises furnished by the lessor and that the lessee intentionally refrained from putting his agreement in writing, intending to take advantage of that fact later, it was held, without determining whether there had been a surrender of the premises by the lessee, that a decree dismissing the bill was well warranted because the facts warranted findings, that the plaintiff had estopped himself from relying on the fact that his agreement was not in writing and that the granting of an injunction would operate inequitably. *Peoples Express, Inc. v. Quinn*, 156.

Bill for Instructions.

Upon a bill in equity for instructions by the trustees under a declaration of trust executed in Massachusetts by a single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit. *Greenough v. Osgood*, 235.

In a suit by a trustee under a will for instructions as to the proper disposition of certain income and principal, it was necessary, in order properly to determine the rights and interests of the life beneficiaries, to make some determination, before the termination of the life estates, of what disposition should be made of the fund upon that event; but it was said that this departure from the well settled rule that such determination before the event is premature should not be regarded as a precedent. *Old Colony Trust Co. v. Sargent*, 298.

To enjoin Unlawful Interference.

See UNLAWFUL INTERFERENCE.

Reformation of Instrument in Writing because of Mistake.

Misconception of the legal effect of the language used in a declaration of trust is not a "mistake of law" entitling the settlor to maintain a suit in equity to reform the instrument. *Coolidge v. Loring*, 220.

An instrument will not be reformed on the ground of mistake except upon full, clear and decisive proof of the mistake. *Ibid.*

A declaration of trust which placed upon the trustees important contractual duties and responsibilities will not be reformed by reason of a mistake in which it is not shown that the trustees participated. *Ibid.*

Evidence upon which it was held that a suit in equity could not be maintained by the settlors under a declaration of trust to reform the instrument so that it would permit them to terminate the trust by a surrender of their life interests to the remaindermen, the settlors alleging that appropriate language for that purpose was omitted from the instrument through mistake. *Ibid.*

To redeem from Mortgage

A wife, who, for the purpose of releasing her rights of dower and homestead and rights given her by statute, joined with her husband in a mortgage of real estate owned by him, may maintain a bill in equity to redeem the real estate from the mortgage. *Ryder v. Brockton Savings Bank*, 476.

A wife's inchoate right of dower in real estate of her husband gives her no right to maintain a bill in equity to redeem real estate of his from a mortgage made by him in which she did not join. *Ibid.*

Suit by Minority Stockholders.

A demurrer to a bill in equity by a minority stockholder, who also is one of eight directors of a Massachusetts corporation, against the corporation and the other seven directors, who include all the officers of the corporation, to enjoin the defendants from carrying out certain votes, passed by the seven defendant directors against the objection and vote of the plaintiff, will be overruled where, from the allegations of the bill, it appears that four of the seven individual defendants conspired with the other three to deprive and to defraud the plaintiff of her rights as a stockholder and adopted the votes in pursuance of that purpose. *Almy v. Almy, Bigelow & Washburn, Inc.* 227.

Where it appeared, from allegations in the bill in equity above described, that the plaintiff was present at the meeting when the objectionable votes were passed and that she protested and voted against them, and, within six months thereafter, brought the suit, it was held that the plaintiff showed proper diligence in asserting her rights. *Ibid.*

Laches.

Where it appeared from allegations in a bill in equity by a minority stockholder, who was also a director of a Massachusetts corporation, against the

Equity Jurisdiction (continued).

corporation and the other directors to enjoin the defendants from carrying out certain votes of the directors that the plaintiff was present at the meeting when the objectionable votes were passed and that she protested and voted against them and within six months thereafter brought the suit, it was held that the plaintiff showed proper diligence in asserting her rights.

Almy v. Almy, Bigelow & Washburn, Inc. 227.

In the above described suit it also was held that it not appearing that there had been any delay on the part of the plaintiff which had caused her husband or the executor of his will to sleep on his rights, the suit was not barred by laches. *Glover v. Waltham Laundry Co.* 330.

Estoppel.

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that since the defendant executor stood in the same position as had the plaintiff's husband, to whom her property had been entrusted and who was in no way deceived by her conduct, the plaintiff was not estopped to assert her claim in this suit. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it also was held that in the absence of any finding that the rights of any creditor of the business, either before or after the incorporation, were placed in jeopardy, the plaintiff was not estopped to assert her claim by reason of her having permitted her husband to hold himself out as the owner of the business. *Ibid.*

Statute of Limitations.

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that the suit was not barred by the statute of limitations. *Glover v. Waltham Laundry Co.* 330.

To enjoin Lessor from Interfering with Quiet Enjoyment by Lessee.

One who is occupying real estate under a lease in writing cannot maintain a suit in equity to enjoin the lessor from compelling him to vacate the premises in accordance with a condition in the lease giving the lessor a right of re-entry upon a failure of the lessee to pay rent as called for by the lease, where it appears that the plaintiff's failure to pay his rent when due was so settled a habit as to be described rightly as a general course of conduct and that the circumstances of continued delay were annoying in nature and were accompanied by frequent drawing of checks when there were no funds to meet them. *Darvirris v. Boston Safe Deposit & Trust Co.* 76.

Evidence in a suit in equity by a lessee to enjoin a lessor from tearing down the leased premises and erecting a new building upon which it was held, without determining whether there had been a surrender of the premises by the lessee, that a decree dismissing the bill was well warranted. *Peoples Express, Inc. v. Quinn*, 156.

To enforce Provisions of St. 1907, c. 191.

St. 1907, c. 191, does not confer upon a board of survey a right to maintain a suit in equity to restrain an owner of land from laying out and constructing streets therein because he has not complied with the provisions of the statute relating to the filing of plans with the board. *Lexington Board of Survey v. Suburban Land Co.* 108.

To enjoin Sale of Real Estate.

Where an insane person for a nominal consideration conveyed certain real estate to one who forthwith for a like consideration conveyed it to the insane person and a third person and to the survivor of them, and a creditor of the third person brought an action against him to recover his debt, attached his interest in the real estate and recovered a judgment, the guardian of the insane person was entitled to an injunction against the attaching creditor to restrain the enforcement of his judgment against the land. *Brewster v. Weston*, 14.

To enjoin Express Company from using Railroad.

Where a contract of an express company with a railroad contained a provision "That I will not ship or cause to be shipped any articles . . . unless accompanied by a messenger having an express ticket" and the express company repeatedly and deliberately violated this provision, and the Director General of Railroads while in charge of the operation of the railroad corporation, in May, 1919, notified the express company that all its privileges of doing business on the trains of the railroad were terminated and the express company refused to recognize the notice as binding, it was held that the Director General in a suit in equity was entitled to a decree enjoining the corporation from further use of the lines of the railroad in question. *Director General of Railroads v. Peoples Express, Inc.* 199.

To enjoin Violation of Municipal Ordinance.

An owner of land cannot maintain a suit in equity to enjoin the erection of a building upon adjoining land which is in violation of a municipal ordinance if such structure is not in itself noxious nor unusually dangerous nor in violation of the private rights of the plaintiff. *O'Keefe v. Sheehan*, 390.

To enforce Resulting Trust.

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that a decree should be entered directing that the shares of stock in the corporation which had stood in the name of the husband and his nominee should be conveyed to the plaintiff, and that there should be an accounting to her for dividends received thereon. *Glover v. Waltham Laundry Co.* 330.

To enjoin Violation of Equitable Restriction.

Evidence in a suit in equity to enjoin the defendant from violating an equitable restriction by maintaining a stable on land adjoining the plaintiff's land upon which it was held that the plaintiff was not prevented from maintaining the suit by laches, waiver or acquiescence. *O'Keefe v. Sheehan*, 390.

In the above described suit a master to whom the suit was referred found in substance that the evidence upon the question whether the stable was "in the nature of a nuisance" was "not very complete nor very satisfactory," that "it could hardly be otherwise," and that he could not see "how any one can tell how this will be until a fair trial of the new arrangements is given" and it was held that the negative findings of the master upon the question whether the defendant's use of the premises was a nuisance required that the bill be dismissed without prejudice and without costs. *Ibid.*

To enjoin Use of Trade Name.

Evidence in a suit by one Robert Burns to restrain a corporation named William J. Burns International Detective Agency, Inc. from using the name "Burns Detective Bureau," "Burns Detective Agency" or "Burns Agency," upon which it was held that William J. Burns had a right to use his own name in his business as a detective and to incorporate and carry on a detective agency with the use of that name. *Burns v. William J. Burns International Detective Agency, Inc.* 553.

Evidence in the above described suit of the form of listing the defendant's name in the telephone directory upon which it was held that the likelihood that the mere alphabetical arrangement in the telephone directory would mislead was not a sufficient reason for issuing an injunction, where it did not appear that the defendant attempted to hold itself out as the plaintiff, or to deceive the plaintiff's patrons. *Ibid.*

Evidence in the above described suit upon which it was held that the bill should be dismissed. *Ibid.*

To reach and apply Property conveyed in Fraud of Creditors.

Evidence at the hearing of a suit in equity to reach and apply in payment of a judgment debt securities of the judgment debtor alleged to have been placed by him, in fraud of his creditors, in the hands of a second defendant, upon which it was held that the finding of the trial judge that certain shares of preferred stock remaining in the name of the second defendant were the property of the judgment debtor and were issued to the second defendant under an agreement or understanding between him and the judgment debtor, with the purpose of concealing the true ownership through a secret trust and in fraud of creditors, and that the shares were held by the second defendant without consideration, could not be said to be plainly wrong. *Martell v. Dorey*, 35.

It is not necessary, in order to maintain a suit in equity to reach and apply, in payment of a debt owed to the plaintiff, property of the debtor conveyed by him in fraud of his creditors, that the plaintiff should have been a creditor at the time of the fraudulent conveyance. *Ibid.*

In a suit in equity in the Superior Court to reach and apply certain shares of stock in payment of a judgment debt where a decree was made that certain shares evidenced by certificates other than those enumerated might be reached and applied to satisfy the judgment debt, it was held upon an appeal from the final decree, that a motion should be allowed in the Superior Court to amend the bill to include the particular certificates described in the final decree and that, upon such amendment being allowed, the decree should be affirmed. *Martell v. Dorey*, 35.

EQUITY PLEADING AND PRACTICE.

Bill.

Upon a reservation for this court of a suit in equity upon the bill and a demurrer, no intendments are made in favor of the plaintiff, who should aver in the bill every material fact essential to a right to relief. *Lexington Board of Survey v. Suburban Land Co.* 108.

Circumstances under which a bill in equity by individual "certificate holding members" of the corporation, Boston Chamber of Commerce, brought in their own behalf and in behalf of others, similarly situated and entitled, who might be permitted to join as plaintiffs, against that corporation, its officers, board of directors and the board of trustees constituted under the provisions of St. 1914, c. 82, is not multifarious. *Tapper v. Boston Chamber of Commerce*, 209.

Upon a demurrer to the bill above described, an allegation in the bill that a vote of the directors of the defendant corporation, which purported to authorize the purchases of shares declared by the plaintiffs to be illegal, was passed "by a board of directors" of which eight members, who were named, were "ineligible to vote upon matters affecting the management of the property of the corporation," in the absence of an allegation that the eight named members were present or, being present, voted with the other members of the board, was held not to contain an allegation showing that the vote was illegal because it was participated in by persons having no authority to do so. *Ibid.*

It was held that a demurrer to a bill in equity by a minority stockholder, who also is one of eight directors of a Massachusetts corporation, against the corporation and the other seven directors, who include all the officers of the corporation, to enjoin the defendants from carrying out certain votes, passed by the seven defendant directors against the objection and vote of the plaintiff, and to compel an accounting by the individual defendants and a repayment of certain sums received by them, will be overruled where, from the allegations of the bill, it appears that four of the seven individual defendants conspired with the other three to deprive and to defraud the plaintiff of her rights as a stockholder and adopted the votes in pursuance of that purpose. *Almy v. Almy, Bigelow & Washburn, Inc.* 227.

The bill in equity above described was held not to be multifarious. *Ibid.*

It was not necessary for the plaintiff, before commencing the suit above described, to apply to the corporation to bring suitable action against the individual defendants because it appears from the facts alleged in the bill and admitted by the demurrer that such application would have to be made

Equity Pleading and Practice.

to the defendants to take action against themselves and either would be futile and unavailing or would result in the authors of the wrong conducting litigation in the name of the corporation against themselves, which would be contrary to the established principles of justice. *Almy v. Almy, Bigelow & Washburn, Inc.* 227.

Where it appeared from allegations in the bill in equity above described, that the plaintiff was present at the meeting when the objectionable votes were passed and that she protested and voted against them, and, within six months thereafter, brought the suit, it was held that the plaintiff showed proper diligence in asserting her rights. *Ibid.*

Certain allegations in the bill in equity above described which were held under the circumstances not immaterial and irrelevant and therefore in violation of R. L. c. 159, § 12. *Ibid.*

Although, in a suit in equity to enjoin the maintenance by the defendant of a barway only ten and eighteen one hundredths feet wide in a fence at the point where the plaintiff had access to a right of way to which he was entitled over land of the defendant, the prayers of the bill do not specifically include a request that a proper minimum width for the barway be determined, if, upon evidence warranting it, a finding is made by the trial judge that the width of the way should not be less than fifteen feet, it is proper to include in the final decree an order that the opening in the defendant's fence should not be less than that width. *Dunham v. Dodge*, 367.

Demurrer.

Upon a reservation for this court of a suit in equity upon the bill and a demurrer, no intendments are made in favor of the plaintiff, who should aver in the bill every material fact essential to a right to relief. *Lexington Board of Survey v. Suburban Land Co.* 108.

Amendment.

After an appeal from a final decree of the Superior Court in a suit in equity had been entered in this court and on motion before argument discharged, the Superior Court had no power to allow an amendment of the bill as of a date preceding the entry of the final decree so that the findings of the trial judge and the final decree conformed to the allegations of the bill as amended in a particular which had been fully tried when the suit was heard upon the merits. *Martell v. Dorey*, 35.

Upon the return to this court of the record in the suit above described with the action of the judge of the Superior Court and the amendment appended thereto it was held that the case must be considered only upon the record as presented by the original appeal from the final decree. *Ibid.*

When a suit in equity comes before this court upon an appeal from a final decree with a report of the evidence, the powers of this court for the accomplishment of justice are extensive and include power to order or to authorize amendments to pleadings. By RUGG, C. J. *Ibid.*

In a suit in equity in the Superior Court to reach and apply, in payment of a judgment debt, property conveyed by the judgment debtor to others in fraud of his creditors, evidenced by certain shares of stock in a certain corporation where decree was made that certain shares evidenced by certificates

other than those enumerated might be reached and applied to satisfy the judgment debt, it was held upon an appeal from the final decree, that a motion should be allowed in the Superior Court to amend the bill to include the particular certificates described in the final decree and that, upon such amendment being allowed, the decree should be affirmed. *Martell v. Dorey*, 35.

Answer.

Upon a bill of interpleader brought by an insurer in a policy of life insurance which had been assigned by the insured and the beneficiary under the policy "In consideration of Fifteen Hundred Dollars to us paid," to one from whom the insured had borrowed that sum of money, where it appeared that the insured also delivered to the assignee a promissory note bearing his signature and the forged signature of the beneficiary and the assignment did not state that it was given as security nor did it contain any reference to the note it was held that, no question of pleading having been raised at the trial, the defendant assignee was not precluded from insisting upon his rights under the assignment by an allegation in his answer, to which a copy of the assignment was annexed, that the assignment was given as security for the note. *Connecticut Mutual Life Ins. Co. v. Allen*, 187.

Agreed Statement of Facts.

A statement, in an agreed statement of facts in a suit in equity brought by the settlors to reform a declaration of trust so that it would permit them to terminate it by a surrender of their interests to the remaindermen in their lifetime, that "there was no intention on their part to create interests which would prevent an immediate distribution in the event of such a surrender," falls short of indicating that the settlors had an intention not to create such interests. *Coolidge v. Loring*, 220.

Master.

Upon an appeal from a decree in a suit in equity entered by order of a single justice who had heard the suit solely upon the report of a master which did not contain a report of the evidence, the facts found by the master must be taken as true unless upon the face of his report they are mutually inconsistent or contradictory and plainly wrong. *Glover v. Waltham Laundry Co.* 330.

In the same suit it was held that this court, with reference to the facts found by the master and the power and duty to draw inferences therefrom, stand as did the single justice, unaffected by conclusions reached by him. *Ibid.*

Findings by Judge.

Findings of a judge upon a bill of interpleader brought by an insurer in a policy of life insurance which had been assigned by the insured and the beneficiary under the policy "In Consideration of Fifteen Hundred Dollars to us paid," to one from whom the insured had borrowed that sum of money and delivered a promissory note bearing his signature and the forged signature of the beneficiary which it was held must be assumed to be war-

ranted by the evidence, which was not reported. *Connecticut Mutual Life Ins. Co. v. Allen*, 187.

Reservation.

Upon a reservation for this court of a suit in equity upon the bill and a demurrer, nointendments are made in favor of the plaintiff, who should aver in the bill every material fact essential to a right to relief. *Lexington Board of Survey v. Suburban Land Co.* 108.

Decree.

Although, in a suit in equity to enjoin the maintenance by the defendant of a barway only ten and eighteen one hundredths feet wide in a fence at the point where the plaintiff had access to a right of way to which he was entitled over land of the defendant, the prayers of the bill do not specifically include a request that a proper minimum width for the barway be determined, if, upon evidence warranting it, a finding is made by the trial judge that the width of the way should not be less than fifteen feet, it is proper to include in the final decree an order that the opening in the defendant's fence should not be less than that width. *Dunham v. Dodge*, 367.

Nunc pro tunc.

After an appeal from a final decree of the Superior Court in a suit in equity had been entered in this court and on motion before argument discharged, the Superior Court had no power to allow an amendment of the bill as of a date preceding the entry of the final decree so that the findings of the trial judge and the final decree conformed to the allegations of the bill as amended in a particular which had been fully tried when the suit was heard upon the merits. *Martell v. Dorey*, 35.

Record.

Upon the return to this court of the record in the suit above described with the action of the judge of the Superior Court and the amendment appended thereto, it was held that the case must be considered only upon the record as presented by the original appeal from the final decree. *Martell v. Dorey*, 35.

Appeal.

After an appeal from a final decree of the Superior Court in a suit in equity had been entered in this court and on motion before argument discharged, the Superior Court had no power to allow an amendment of the bill as of a date preceding the entry of the final decree so that the findings of the trial judge and the final decree conformed to the allegations of the bill as amended in a particular which had been fully tried when the suit was heard upon the merits. *Martell v. Dorey*, 35.

Upon the return to this court of the record in the suit above described with the action of the judge of the Superior Court and the amendment appended thereto it was held that the case must be considered only upon the record as presented by the original appeal from the final decree. *Ibid.*

When a suit in equity comes before this court upon an appeal from a final decree with a report of the evidence, the powers of this court for the accomplishment of justice are extensive and include power to order or to authorize amendments to pleadings. By *Rugg, C. J. Martell v. Dorey*, 35.

An appeal from a final decree of the Superior Court in a suit in equity, where the evidence was in part oral and was taken and reported by a commissioner appointed under Equity Rule 35, brings both questions of fact and questions of law for revision to this court, who must examine the evidence and decide the case according to their own judgment, giving due weight to findings of the trial judge, whose decision, based upon the hearing of oral testimony, will not be reversed unless plainly wrong. *Ibid*.

Upon an appeal from a final decree entered in a suit in equity by order of a single justice who had heard the suit solely upon the report of a master which did not contain a report of the evidence, this court, with reference to the facts found by the master and the power and duty to draw inferences therefrom, stand as did the single justice, unaffected by conclusions reached by him. *Glover v. Waltham Laundry Co.* 330.

Upon an appeal from a decree in a suit in equity entered by order of a single justice who had heard the suit solely upon the report of a master which did not contain a report of the evidence, the facts found by the master must be taken as true unless upon the face of his report they are mutually inconsistent or contradictory and plainly wrong. *Ibid*.

ERROR, WRIT OF.

See WRIT OF ERROR.

ESTOPPEL.

In a suit in equity by a lessee to enjoin a lessor from tearing down the leased premises and erecting a new building where there was evidence that the lessee orally agreed with the lessor to surrender possession of the leased premises and to accept of premises furnished by the lessor and that the lessee intentionally refrained from putting his agreement in writing, intending to take advantage of that fact later, it was held, without determining whether there had been a surrender of the premises by the lessee, that a decree dismissing the bill was well warranted because the facts warranted findings, that the plaintiff had estopped himself from relying on the fact that his agreement was not in writing. *Peoples Express, Inc. v. Quinn*, 156.

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that since the defendant executor stood in the same position as had the plaintiff's husband, to whom her property had been entrusted and who was in no way deceived by her conduct, the plaintiff was not estopped to assert her claim in this suit. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it also was held that in the absence of any finding that the rights of any creditor of the business, either before or after the incorporation, were placed in jeopardy, the plaintiff was not estopped to

Estoppel (continued).

assert her claim by reason of her having permitted her husband to hold himself out as the owner of the business. *Glover v. Waltham Laundry Co.* 330.

Where land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title, the widow died in 1889, leaving surviving her her husband and children of their union and the husband died in 1900, it was held that the heirs of the married woman were not estopped, by the deed of the husband in 1863 in which she joined for release of dower, from asserting that that deed conveyed only an estate for the life of the husband. *Nickerson v. Nickerson*, 348.

The heirs of a married woman, who in 1865 made a deed of land with full covenants of warranty, in which her husband did not join and to which he did not assent in writing, are not estopped from asserting, fifty-three years after the date of the deed, twenty-nine years after her death and eighteen years after the death of her husband, that the deed was void. *Ibid.*

Where at the trial of an action upon a promissory note given as part consideration by the purchaser to the seller of certain brick under a formal bill of sale which contained a warranty of title but no warranty or representation as to quality a colloquy occurred between the counsel for the defendant and the judge as to whether the defendant claimed a misrepresentation of quality of the bricks and the judge ordered a verdict for the plaintiff and in this court the defendant "waived all the defences set up in the answer except that of misrepresentation as to the quality of the bricks sold, and that the consideration, if there was any, failed," it was held that the judge must have understood from the statements of the defendant's counsel that he did not rely on the alleged misrepresentation; and therefore that, the defence of breach of warranty not being open under the contract, the ordering of the verdict was right. *Bennett v. Thomson*, 463.

EVIDENCE.

Confession.

A confession made to a person in authority, even though it be induced by the solicitation and inquiry of such person, is *prima facie* voluntary and the person objecting to its admission in evidence must show that it was made under such pressure of hope or fear as to raise a doubt of its accuracy. *Commonwealth v. Szczepanek*, 411.

Evidence at the trial of an indictment for murder which it was held did not conclusively prove that a confession made by the defendant was procured by inducements engendering hope or fear. *Ibid.*

The whole evidence at the trial of the same indictment it was held disclosed no facts which justified a contention of the defendant that his confession was not made "freely, voluntarily and without compulsion or inducement of any sort." *Ibid.*

Presumptions and Burden of Proof.

Where a through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be pre-

sumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage" the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and the burden of proving such negligence was upon the shipper. *Florida Cotton Oil Co. v. Clyde Steamship Co.* 10.

Evidence at the hearing of a suit in equity to reach and apply in payment of a judgment debt securities of the judgment debtor alleged to have been placed by him, in fraud of his creditors, in the hands of a second defendant, upon which it was held that the finding of the trial judge that certain shares of preferred stock remaining in the name of the second defendant were the property of the judgment debtor and were issued to the second defendant under an agreement or understanding between him and the judgment debtor, with the purpose of concealing the true ownership through a secret trust and in fraud of creditors, and that the shares were held by the second defendant without consideration, could not be said to be plainly wrong. *Martell v. Dorey*, 35.

In an action upon an account annexed for a balance alleged to be due for furniture sold to the defendant and delivered to his daughter, the burden of proof is upon the plaintiff to prove by a fair preponderance of the evidence that the goods were sold to the defendant. *Jackson Caldwell Co. v. Poto*, 58.

The circumstances, in the action above described, that the father made payments of considerable amounts upon the purchase price of a number of items of furniture for the home of his married daughter and that a few chairs included in the items in the account annexed to the declaration were delivered at his place of business, although important as evidence were held not as a matter of law to be decisive in fixing liability upon the father. *Ibid.*

In an action of tort for slander, where the plaintiff alleged in the declaration that the defendant "in the Italian language" called her "buttana," which in the English language meant a whore, and the plaintiff's evidence tended to show that the word was used in the presence of others who understood its meaning and that it was in the Sicilian dialect, it was held that a finding for the plaintiff was warranted. *Bellingheri v. Aliosi*, 146.

In an action against a stockbroker by a customer for breach of an agreement to receive, buy and sell, and carry securities on margin, the burden rests on the stockbroker to prove that he had in his possession or control at all times, available for delivery to the plaintiff, the securities which he purported to be carrying for him. *Crehan v. Megargel*, 279.

Sole and uninterrupted possession of land, owned in common, by one of the tenants in common with appropriation by him of the profits with the knowledge of the others, if continued for a long series of years, unexplained and uncontrolled by any evidence tending to show a reason for the failure of the other tenants in common to assert rights, furnishes evidence upon which an inference of an actual ouster and adverse possession may and ought to be drawn. *Nickerson v. Nickerson*, 348.

Evidence at the trial of an action upon a promissory note given as consideration by the purchaser to the seller of certain brick under a formal bill of sale upon which it was held that a finding would not have been warranted that the plaintiff made fraudulent statements which induced the defendant to purchase the brick and upon which the defendant relied; and, therefore,

Evidence (continued).

that the verdict for the plaintiff rightly was ordered. *Bennett v. Thomson*, 463.

Competency.

In an action by a child, who received injuries caused by falling through a defective gate into an unused dumb-waiter well, against the landlord, evidence of regulations of the board of elevator regulations, which specifically provided that they did not relate to dumb-waiters, were held improperly to have been admitted in evidence. *Angevins v. Hewitson*, 126.

Evidence on the issue of damages, at the trial of an action for breach of a contract in writing to employ the plaintiff as general manager of a store, the plaintiff agreeing to give "all his undivided time and attention exclusively to the said business," upon which it was held that a question asked of the plaintiff, "How did it happen you incurred expenses before beginning your connection with" the merchant's store? was competent, as the plaintiff had a right to show that the money paid to him by the merchant was not for services and, therefore, should not be considered in mitigation of damages. *Hanneman v. Shivek & Sons, Inc.* 317.

At the trial of an indictment charging a man with perjury, it is proper to admit in evidence testimony of his wife, voluntarily given, as to statements which were made by him to her previous to their marriage and which tend to establish his guilt. *Commonwealth v. Barronian*, 364.

At the trial of an indictment charging that the defendant in January, 1918, falsely testified that he did not own certain real estate, evidence is admissible tending to show that shortly before July, 1917, he stated that he did own it. *Ibid.*

Evidence at the trial of an action by a woman for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate upon a sidewalk by a broken spout on a house of the defendant, which was held was material, for the purpose of laying a foundation for the admission of the photographs and to connect and make relevant the evidence as to the appearance and conditions of the sidewalk at that place and time and which was not incompetent as being self-serving or "manufactured." *Burke v. Kellough*, 405.

At the trial of the action above described, testimony from a deposition of the associate counsel for the plaintiff properly may be admitted, tending to show that, at the time when the photographs were taken, he noticed ice where the snow was swept off, and made measurements, which he described in detail. *Ibid.*

Evidence at the trial of an indictment for murder which it was held did not conclusively prove that a confession made by the defendant was procured by inducements engendering hope or fear. *Commonwealth v. Szczepanek*, 411.

The admissibility of certain questions asked in cross-examination of a former employee of the defendant, who was called as a witness for the plaintiff at the trial of an action of tort for personal injuries alleged to have been caused by the negligence of the defendant in removing an iron fence, was held to have been within the discretion of the trial judge. *Del Visco v. General Electric Co.* 415.

Although the Commonwealth is not obliged in any case to prove a motive for the committing of the crime of murder, evidence tending to show a motive

always is competent because, if clearly shown, it may help to confirm the conclusion, reached upon all the other evidence, that the accused committed the crime charged. *Commonwealth v. Feci*, 562.

Evidence given by the foreman of the deceased at the trial of an indictment for murder, where the Commonwealth contended that the deceased was murdered either for revenge because he had revealed the hiding place of stolen brass junk or to remove him as a possible witness to the theft of the junk, which was held competent as tending to show that the secreted brass junk was stolen property. *Ibid.*

Evidence given by the foreman of the deceased at the above described trial which, taken in connection with certain other evidence, was held tended to show that the defendant had stolen the junk and had secreted it. *Ibid.*

While a defendant indicted for a crime is not to be convicted by evidence that he previously had committed other crimes wholly disconnected with that charged and such evidence should be excluded, yet, if it be shown that the defendant has committed other crimes, the proof of which has a tendency to establish the commission of the crime charged, evidence of the commission of the earlier crimes is admissible. *Ibid.*

Relevancy and Materiality.

At the trial of an action upon an account annexed for a balance alleged to be due for furniture sold to the defendant and delivered to his daughter, evidence tending to show that the defendant suggested to the plaintiff that efforts be made to collect the bill for the furniture from the daughter's husband was properly excluded. *Jackson Caldwell Co. v. Poto*, 58.

Evidence at the trial of an action by the owner of shares of the capital stock of a corporation against a purchaser of the shares and a surety company, which had executed a bond to indemnify the seller which was offered by the plaintiff, to show a waiver by the surety company of a certain defence it was stated properly was excluded because it did not tend to show a waiver by the company. *Burdett v. Walsh*, 153.

Evidence in an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as a part of an agreement made upon the third director severing his active connection with the corporation, tending to show that the other stockholders of the corporation obtained their stock by issuing notes therefor in violation of St. 1903, c. 437, § 14, it was held was immaterial. *Moss v. Copelof*, 162.

At the trial of an action of tort against a street railway company for the loss of a horse caused by injuries received when he was on the highway in the care of the plaintiff's daughter, it is proper to exclude as immaterial evidence tending to show that with the plaintiff's knowledge the horse had been upon the highway unattended a number of times previous to the accident. *Kadra v. Middlesex & Boston Street Railway*, 176.

Where, in the answer in a suit based upon a judgment debt alleged to be owed to the plaintiff by a woman, the defendant alleged satisfaction of the debt by an accord and satisfaction, the defendant properly may be allowed to introduce evidence of negotiations leading up to a payment of less than the amount of the judgment debt under an agreement by the plaintiff that such amount would be accepted in satisfaction of that debt and also of a judgment debt

Evidence (continued).

owed to the plaintiff by the defendant's husband, which she was under no obligation to pay, and that the plaintiff further in writing agreed to indorse full satisfaction upon executions which had issued upon the judgments. *Barnett v. Rosen*, 244.

The admissibility of certain questions asked in cross-examination of a former employee of the defendant, who was called as a witness for the plaintiff at the trial of an action of tort for personal injuries alleged to have been caused by the negligence of the defendant in removing an iron fence, was held to have been within the discretion of the trial judge. *Del Visco v. General Electric Co.* 415.

In the same action it was held that the defendant was entitled to show that the fall of the fence happened, not through his negligence but because of the acts of others who unlawfully climbed on or loosened or interfered with it, causing it to topple over, and inquiry of witnesses tending to prove that contention was admissible in evidence. *Ibid.*

Fifteen letters and post cards received from the defendant by the complainant between January 7 and July 23, 1918, which were admitted in evidence at the trial of a complaint under St. 1913, c. 563, charging that the defendant, not being the husband of the complainant, did get her with child on January 13, 1919, which were held were not too distinct in character nor remote in time, and were admissible to establish and characterize the intimacy between the parties. *Commonwealth v. Brophy*, 438.

Where, at the trial of the indictment of a man for robbery of jewels, it appeared that the defendant was a dentist and had performed services as such for the complaining witness, and the defendant was permitted to show the value of that work, the defendant offered and the judge excluded evidence as to the reputation of the defendant as a dentist it was held, that the evidence was irrelevant and properly was excluded. *Commonwealth v. Homer*, 526.

Evidence given by a witness on redirect examination by the district attorney at the trial of an indictment for robbery which was held within the discretion of the judge to admit. *Ibid.*

Evidence, at the trial of an indictment for murder, that the deceased and his foreman had a conversation it was held referred to a relevant fact and was competent. *Commonwealth v. Feci*, 562.

Remoteness.

At the trial of an indictment charging a man with perjury, it is proper to admit in evidence testimony of his wife, voluntarily given, as to statements which were made by him to her previous to their marriage and which tend to establish his guilt. *Commonwealth v. Barronian*, 364.

Fifteen letters and post cards received from the defendant by the complainant between January 7 and July 23, 1918, which were admitted in evidence at the trial of a complaint under St. 1913, c. 563, charging that the defendant, not being the husband of the complainant, did get her with child on January 13, 1919, which were held, were not too distinct in character nor remote in time, and were admissible to establish and characterize the intimacy between the parties. *Commonwealth v. Brophy*, 438.

Extrinsic affecting Writings.

An order in writing for goods, signed by the purchaser and containing provisions that no goods should be returned without permission of the seller, that no agreements other than those written on the order would be recognized and that verbal agreements with the salesman would not be recognized, is complete and free from ambiguity, and is unaffected by a memorandum on the order made by a salesman for the plaintiff requesting the plaintiff to advise the defendant whether an exchange of certain goods could be made for the goods described in the order. *Benford Manuf. Co. v. Standard Tire & Rubber Co.* 380.

Pleadings.

Evidence introduced by the defendant in cross-examination of the plaintiff while holding the pleadings in his hand, in an action of contract which was held was not a violation of R. L. c. 173, § 85. *Woodworth v. Fuller*, 443.

Opinion: Experts.

It is within the discretionary power of a trial judge to exclude a hypothetical question asked of an expert witness if in the question facts are assumed which are not yet in evidence. *Earle v. New York Central & Hudson River Railroad*, 61.

A hypothetical question asked by the defendant in cross-examination of an expert medical witness called by the plaintiff at the trial of an action of tort based upon an assumption of facts of which no evidence yet had been introduced was held properly excluded. *Ibid.*

At the trial of an action at law, where one question related to the validity of an issue of preferred stock to one who was the chief stockholder, one of the directors and the general manager of a Massachusetts corporation, in payment for a sum standing to his credit on the corporation's books which was an accumulation of annual divisions of profits of the corporation, an inquiry of a certified public accountant, not in the employ of the corporation, as to what would be the reasonable minimum compensation for the executive officers of the corporation during a period as to which he had examined the corporation's books of account, properly may be excluded. *Beaman v. Gerrish*, 79.

To discredit Witness.

Evidence given by a witness before the grand jury which was offered by the defendant at the trial of an indictment for robbery of jewels for the purpose of discrediting the witness and which it was held should have been admitted. *Commonwealth v. Homer*, 526.

To show Bias of Witness.

Where testimony by affidavit by a former maid of the complaining witness at the trial of an indictment for robbery having been admitted to show

Evidence (continued).

improper relations of that witness with the defendant, the witness was recalled by the district attorney and was permitted to be asked how the affiant came to leave her employ, and answered, "I discharged her," and the defendant excepted it was held that, while the evidence properly might have been excluded, as the bias which one witness at a criminal trial feels toward another is not a material matter, under the circumstances of the statements in the affidavit, no reversible error was shown. *Commonwealth v. Homer*, 526.

Of Commission of other Crimes.

While a defendant indicted for a crime is not to be convicted by evidence that he previously had committed other crimes wholly disconnected with that charged and such evidence should be excluded, yet, if it be shown that the defendant has committed other crimes, the proof of which has a tendency to establish the commission of the crime charged, evidence of the commission of the earlier crimes is admissible. *Commonwealth v. Feci*, 562.

Of Testimony before Grand Jury.

Evidence given by a witness before the grand jury which was offered by the defendant at the trial of an indictment for robbery of jewels for the purpose of discrediting the witness and which it was held should have been admitted. *Commonwealth v. Homer*, 526.

Of Custom.

Evidence in an action against a railroad company for personal injuries caused by a bundle of newspapers, pushed from a baggage car by an employee of the defendant, falling upon the plaintiff, who was at the door of the car to receive the papers for his employer, which it was held warranted a finding that the plaintiff, when injured, was at the baggage car door with the rights of one invited by the defendant to be there. *Belyea v. New York, New Haven, & Hartford Railroad*, 225.

Of Agency.

Evidence at the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, where it appeared that a police officer called by the manager of the hotel caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless upon which it was held that a finding was warranted that the officer was constituted the agent of the defendant to arrest the plaintiff and to institute against her whatever criminal proceedings in his opinion could be sustained in any view of the acts of the plaintiff at the restaurant. *Mason v. Jacot*, 521.

Evidence in the above described action upon which it was held that the making of a complaint for drunkenness might fairly be regarded as within the terms of the discretion given to the police officer under all the circumstances. *Ibid.*

Of Fraud.

Evidence at the hearing of a suit in equity to reach and apply in payment of a judgment debt securities of the judgment debtor alleged to have been placed by him, in fraud of his creditors, in the hands of a second defendant, upon which it was held that the finding of the trial judge that certain shares of preferred stock remaining in the name of the second defendant were the property of the judgment debtor and were issued to the second defendant under an agreement or understanding between him and the judgment debtor, with the purpose of concealing the true ownership through a secret trust and in fraud of creditors, and that the shares were held by the second defendant without consideration, could not be said to be plainly wrong. *Martell v. Dorey*, 35.

Of False Representations.

Evidence at the trial of an action upon a promissory note given as consideration by the purchaser to the seller of certain brick under a formal bill of sale upon which it was held that a finding would not have been warranted that the plaintiff made fraudulent statements which induced the defendant to purchase the brick and upon which the defendant relied; and, therefore, that the verdict for the plaintiff rightly was ordered. *Bennett v. Thomson*, 463.

Of Declaration by Deceased Person.

Where at the trial of issues relating to whether a will was executed by a testator of sound mind or was procured to be executed by undue influence an exception was taken by the appellant to the exclusion of evidence which was offered by him of a declaration by a deceased person of a statement made to him by the testator, which declaration would have been admissible in evidence under R. L. c. 175, § 66, if the judge had found that it was made in good faith and upon the personal knowledge of the declarant it was held that, because the judge did not find that the statement of the deceased person was made in good faith, and his action could not be said to be unjustifiable, the exception must be overruled. *Bodfish v. Cross*, 428.

Of Motive.

Although the Commonwealth is not obliged in any case to prove a motive for the committing of the crime of murder, evidence tending to show a motive always is competent because, if clearly shown, it may help to confirm the conclusion, reached upon all the other evidence, that the accused committed the crime charged. *Commonwealth v. Feci*, 562.

Evidence given by the foreman of the deceased at the trial of an indictment for homicide which it was held was admissible as tending to show a motive for the crime. *Ibid.*

Self-serving Statements.

Evidence at the trial of an action by a woman for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate upon a side-

Evidence (continued).

walk by a broken spout on a house of the defendant, which it was held was material, for the purpose of laying a foundation for the admission of the photographs and to connect and make relevant the evidence as to the appearance and conditions of the sidewalk at that place and time and which was not incompetent as being self-serving or "manufactured." *Burke v. Kellough*, 405.

Violation of Ordinance as Evidence of Negligence.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

In Proceedings under the Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

EXCEPTIONS.

In actions at law, see appropriate subtitle under PRACTICE, CIVIL.

EXECUTOR AND ADMINISTRATOR.

An action brought in this Commonwealth against surviving non-resident executors of the will of a testator who died domiciled in this Commonwealth, the writ in which is served upon a new resident agent within two months after the filing of his appointment in the registry of probate, he having succeeded a resident agent who was appointed by the executor within six months after they had filed their bonds, is not barred by the provisions of R. L. c. 141, § 9, as amended by St. 1914, c. 699, § 3, although it is not commenced within one year from the time of the filing by the defendants of their bonds as executors. *J. Cushing Co. v. Brooklyn Trust Co.* 171.

A trustee to whom has been devised and bequeathed real and personal property under a will of which he is also executor, and who is exempt from giving surety on his bond as trustee and executor, where the will provides that he is not to transfer the trust property to the beneficiary until it, with accumulations, has attained a certain amount, may acquire, before the allowance of his final account as executor, title to the personal property by any notorious act of himself as executor showing his election to hold the property thereafter as trustee, and, if the combined real and personal property then has attained the designated amount, he may convey the real estate to the beneficiary, who will thereby acquire a valid title. *Massachusetts Institute of Technology v. Attorney General*, 288.

The provisions of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt,

and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9. *Wheelwright v. Tax Commissioner*, 584.

In the above statutes so construed there is nothing violative of the constitutional rights of executors and administrators. *Ibid.*

EXPRESS COMPANY.

A regulation, established by the Boston and Maine Railroad and continued in effect by the Director General of Railroads while in control of that railroad, which required of an express company, doing a local business upon trains of that railroad between Boston and Amesbury and Boston and Newburyport, that all shipments should be forwarded in baggage car service and that an express messenger must accompany each shipment and present for his personal transportation an express ticket, which differed from the ordinary season ticket only in the respect that it might be used by any person acting as messenger, was held to be reasonable and not in violation of the provisions of St. 1906, c. 463, Part II, §§ 196, 197. *Director General of Railroads v. Peoples Express, Inc.* 199.

The provisions of St. 1906, c. 463, Part II, §§ 196, 197, do not require that a railroad corporation should give to all persons, engaged in a local express business upon its trains under the conditions specified in § 197, absolutely equal terms, facilities and accommodations regardless of conditions, but require only that as to each such person such terms, facilities and accommodations as the railroad shall make shall be reasonable and equal in view of all the attendant circumstances and conditions. *Ibid.*

Where a contract of an express company with a railroad contained a provision "That I will not ship or cause to be shipped any articles . . . unless accompanied by a messenger having an express ticket," and the express company repeatedly and deliberately violated this provision, and the Director General of Railroads while in charge of the operation of the railroad corporation, in May, 1919, notified the express company that all its privileges of doing business on the trains of the railroad were terminated and the express company refused to recognize the notice as binding it was held that the Director General in a suit in equity was entitled to a decree enjoining the corporation from further use of the lines of the railroad in question. *Ibid.*

In the same suit, the express company filed a cross bill seeking a mandatory injunction compelling the Director General to permit it to use the railroad in the course of its business, contending that the regulations in question were discriminatory and unfair to it and this court, in dismissing the cross bill, did so without prejudice to the right of the express company, if any, to apply to the Department of Public Utilities for a revision of the regulation, if so advised. *Ibid.*

FALSE REPRESENTATIONS.

See DECEIT.

FRAUD.

Evidence at the hearing of a suit in equity to reach and apply in payment of a judgment debt securities of the judgment debtor alleged to have been placed by him, in fraud of his creditors, in the hands of a second defendant, upon which it was held that the finding of the trial judge that certain shares of preferred stock remaining in the name of the second defendant were the property of the judgment debtor and were issued to the second defendant under an agreement or understanding between him and the judgment debtor, with the purpose of concealing the true ownership through a secret trust and in fraud of creditors, and that the shares were held by the second defendant without consideration, could not be said to be plainly wrong. *Martell v. Dorey*, 35.

FRAUDS, STATUTE OF.

Evidence in a suit in equity by a lessee to enjoin a lessor from tearing down the leased premises and erecting a new building where it appeared that the lessee orally agreed with the lessor to surrender possession of the leased premises and to accept other premises furnished by the lessor, and that the lessee intentionally refrained from putting his agreement in writing, intending to take advantage of that fact later, it was held, without determining whether there had been a surrender of the premises by the lessee, that a decree dismissing the bill was well warranted. *Peoples Express, Inc. v. Quinn*, 156.

GAS AND ELECTRIC LIGHT COMMISSIONERS.

Under St. 1903, c. 417, § 6, neither the board of gas and electric light commissioners nor their successors, the commissioners of the department of public utilities, have power or jurisdiction to refuse approval of a contract by the Boston Consolidated Gas Company for the purchase of gas if the price to be paid therefor "is less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company." *Boston Consolidated Gas Co. v. Department of Public Utilities*, 590.

GRAND JURY.

See appropriate subtitle under PRACTICE, CRIMINAL.

GUARDIAN.

In an action of tort for personal injuries suffered by a person under guardianship as an insane person brought in the name of the guardian it was said

that the action should have been brought in the name of the insane person by her next friend, and not in the name of the guardian; but, no objection having been raised by the defendant, this court treated the action as duly brought in the name of the insane person by her guardian. *Healy v. Boston Elevated Railway*, 150.

HABEAS CORPUS.

See WRIT OF HABEAS CORPUS.

HIGHWAY.

See WAY, Public.

HOMICIDE.

It is reasonable to require that requests for instructions at a trial for homicide shall be presented before the closing arguments of counsel are begun. *Commonwealth v. Hassan*, 26.

It is not error for a judge presiding at the trial of an indictment for manslaughter to refuse to receive requests by the defendant for instructions to be given to the jury if those requests are filed after the closing argument for the defendant and during the argument for the Commonwealth, where the charge to the jury is full and adequate and covers every issue on trial and no contention was made at its close that it was incomplete upon any issue raised at the trial. *Ibid.*

It is proper for the judge presiding at a trial for manslaughter to refuse to give to the jury an instruction which is not applicable to the evidence at the trial. *Ibid.*

Where at the trial of an indictment against two defendants jointly charged with manslaughter, each defendant accusing the other of the homicide and there being evidence that cartridges containing bullets such as were found in the body of the decedent were found concealed in a shoe of one defendant while he was in jail the day after the homicide, the attorney for the other defendant in effect argued that no explanation of this fact had been given in the "lower court," the district attorney made no such comment, and the defendant in whose shoe the cartridges were found requested an instruction that his failure to give an explanation in the lower court could not be considered against him, and relied on St. 1912, c. 325, it was held that an exception to the denial of the request must be overruled, because no objection was made at the trial to the argument of the co-defendant and because St. 1912, c. 325, had no application to such argument. *Ibid.*

Where an indictment for murder was in two counts, each count charging the murder of a different individual and upon motion of the defendant after arraignment and before trial that the district attorney be required to elect on which count the government would go to trial, it appeared that the facts, circumstances and testimony were relevant to prove that both murders were committed by the defendant at substantially the same time with a design and purpose to destroy evidence of the defendant's commis-

Homicide (*continued*).

sion of the crime of larceny at that time, it was held that the defendant had no just complaint because of the denial of his motion. *Commonwealth v. Szczepanek*, 411.

Where upon the trial of an indictment for murder, it appeared in evidence that the defendant when arrested was told by the police officer having him in custody that any statement he made would be used against him, and that later in the day in a police station in another city the defendant, without again being warned, made a confession to the same officer in the presence of other officers, and this confession was admitted in evidence, it was held that the facts that the defendant was in custody, and that he was questioned by the officer in the presence of other officers and at the police station, did not conclusively prove that the confession was procured by inducements engendering hope or fear. *Ibid.*

Upon the whole evidence at the trial of the same indictment it was held that no facts were disclosed which justified a contention of the defendant that his confession was not made "freely, voluntarily and without compulsion or inducement of any sort." *Ibid.*

Although the Commonwealth is not obliged in any case to prove a motive for the committing of the crime of murder, evidence tending to show a motive always is competent because, if clearly shown, it may help to confirm the conclusion, reached upon all the other evidence, that the accused committed the crime charged. *Commonwealth v. Feci*, 562.

Evidence given by the foreman of the deceased at the trial of an indictment for homicide which it was held was admissible as tending to show a motive for the crime. *Ibid.*

Evidence, at the trial of an indictment for murder, that the deceased and his foreman had a conversation it was held referred to a relevant fact and was competent. *Ibid.*

Instructions which permitted a jury to find that one who had committed a homicide was guilty of murder in the first degree because the homicide was committed with extreme atrocity and cruelty are warranted where there was evidence tending to show that the defendant either alone or assisted by others committed the homicide by stabbing and cutting the deceased in twenty places and by shooting him in the head three times. *Ibid.*

HUSBAND AND WIFE.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. *Vaughan v. Mansfield*, 147.

At the trial above described, the defendant asked for, and the judge refused to give, a ruling that "the husband is not liable for necessities furnished to the wife unless they were either furnished with his knowledge and consent that he be responsible for them, or unless he neglects and refuses to furnish them himself," and it was held that the refusal to give the ruling was right. *Ibid.*

In the same action it also was held that a ruling asked for by the defendant that if "the husband furnishes the wife with sufficient means or money to provide her with what is reasonably necessary for her support and comfort, then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts," properly was refused. *Vaughan v. Mansfield*, 147.

It was held in the same action that a ruling asked for by the defendant that the "burden of proof is on the plaintiff to show that the defendant neglected or refused to provide his wife with the necessities before the plaintiff can recover," properly was refused. *Ibid*.

Evidence at the trial of an action by an indorser against the maker of a promissory note that the plaintiff, a married woman, became a holder in due course of the note before its maturity, that she indorsed it in blank and delivered it to a corporation to pay an indebtedness owed to it by her but charged upon its books to the name of her husband, that the note was not paid at maturity and was delivered by the corporation to the plaintiff's husband, who "handed" it to the plaintiff, and that the corporation "charged back" to the husband against certain dividends to which he was entitled the amount of the plaintiff's indebtedness to it, was held to warrant a finding that the husband in the transaction above described acted as the agent of the plaintiff. *Bovarnick v. Davis*, 195.

In the same action it was held that the plaintiff as the person in possession of the note with the husband's assent was entitled to maintain the action in her own name in any event. *Ibid*.

In the same action it also was held that the "charging back" of the amount of the note to the account of the plaintiff's husband with the corporation was not a payment of the note by any one but operated only to discharge the plaintiff's liability to the corporation, so that the plaintiff was remitted to her former rights against the defendant. *Ibid*.

Where, at the trial of an action in Massachusetts on a judgment awarded the plaintiff by the Supreme Judicial Court of Maine in a libel for divorce, the laws of Maine relating to actions between husband and wife are not in evidence, the laws of Massachusetts govern. *Golder v. Golder*, 261.

In the absence of proof that the laws of Maine authorize actions between husband and wife, a woman cannot maintain in this State, during the pendency of a libel for divorce brought by her in Maine, an action against her husband upon a judgment of a Maine court for arrearage of alimony ordered to be paid to her *pendente lite*. *Ibid*.

Subsidiary findings of a master, to whom was referred a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor, which were held were not incompatible with the finding that the man was acting as the plaintiff's agent. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it also was held that since the defendant executor stood in the same position as had the plaintiff's husband, to whom her property had been entrusted and who was in no way deceived by her conduct, the plaintiff was not estopped to assert her claim in this suit. *Ibid*.

In the same suit it was held that in the absence of any finding that the rights of any creditor of the business, either before or after the incorporation, were

placed in jeopardy, the plaintiff was not estopped to assert her claim by reason of her having permitted her husband to hold himself out as the owner of the business. *Glover v. Waltham Laundry Co.* 330.

In the same suit it also was held that it not appearing that there had been any delay on the part of the plaintiff which had caused her husband or the executor of his will to sleep on his rights, the suit was not barred by laches. *Ibid.*

Where land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title, the widow died in 1889, leaving surviving her her husband and children of their union and the husband died in 1900, it was held that the deed of the husband in 1863 conveyed a freehold in the land for his life, leaving rights in reversion in the heirs of his wife. *Nickerson v. Nickerson*, 348.

A deed by a married woman in 1865 of her interest in land owned by herself and others as tenants in common is void if her husband did not join therein nor assent to it in writing. *Ibid.*

Where a married woman executed a deed of land in 1865 in which her husband did not join and to which he did not assent in writing, and the grantee at once entered into possession of the land and she died in 1889, leaving surviving her her husband and children of their union, and the husband died in 1900, it was held that, until the termination by her husband's death of his tenancy by curtesy, the statute of limitations did not begin to run against her heirs' right in the land, which arose from the fact that her deed was void. *Ibid.*

Land owned by a married woman was conveyed in 1851 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of his title and the woman survived her husband and died in 1892, it was held that the petitioner had gained a title to the land by adverse possession. *Ibid.*

The heirs of a married woman, who in 1865 made a deed of land with full covenants of warranty, in which her husband did not join and to which he did not assent in writing, are not estopped from asserting, fifty-three years after the date of the deed, twenty-nine years after her death and eighteen years after the death of her husband, that the deed was void. *Ibid.*

At the trial of an indictment charging a man with perjury, it is proper to admit in evidence testimony of his wife, voluntarily given, as to statements which were made by him to her previous to their marriage and which tend to establish his guilt. *Commonwealth v. Barronian*, 364.

A husband and wife are not living together within the meaning of the workmen's compensation act so that the wife may be conclusively presumed to be wholly dependent upon her husband, where it appears that after the marriage and until his death the husband continued to live with his mother and the wife with her mother, although, from the time of the marriage, the husband contributed to his wife's support and visited her in her home twice a week, usually staying over night, when they occupied the same room. *Breaky's Case*, 460.

A wife, who, for the purpose of releasing her rights of dower and homestead and rights given her by statute, joined with her husband in a mortgage of real estate owned by him, may maintain a bill in equity to redeem the real estate from the mortgage. *Ryder v. Brockton Savings Bank*, 476.

A wife's inchoate right of dower in real estate of her husband gives her no right to maintain a bill in equity to redeem real estate of his from a mortgage made by him in which she did not join. *Ibid*.

A sale in foreclosure of a mortgage of real estate is not rendered invalid by the facts, that the mortgagee was actuated by the purpose and intention, not merely of procuring what was due him under the mortgage but also of procuring the property as his own and of excluding both the mortgagor and his wife therefrom, both when he took the mortgage, in which the mortgagor's wife did not join because she was estranged from him, and later when, upon foreclosure under a power of sale which gave him the privilege of purchasing at the foreclosure sale, he outbid the wife at the sale and purchased the property. *Ibid*.

See SNOW AND ICE.

INCOME.

Tax on income, see appropriate subtitle under TAX.

INDUSTRIAL ACCIDENT BOARD.

See WORKMEN'S COMPENSATION ACT.

INFANT.

Evidence in an action to recover the penalty prescribed in R. L. c. 100, § 62, for allowing the plaintiff's minor son to loiter upon premises where intoxicating liquor was sold, which was held sufficient to warrant a finding that the plaintiff's son was allowed by the defendant to loiter on the premises and to entitle the plaintiff to recover the penalty prescribed in R. L. c. 100, § 62. *Malhoit v. Burns*, 559.

In an action to recover penalties prescribed in R. L. c. 100, § 62, recovery on a count alleging a sale of intoxicating liquor to a minor on a certain date does not bar recovery on another count which alleges that on the same date the minor was permitted to loiter on the premises where the sale was made. *Ibid*.

INSANE PERSON.

A deed by an insane person is ineffectual to convey a title to land which is good against the grantor or his heirs or devisees unless it later is confirmed by the grantor when of sound mind, or by his legally constituted guardian or, after his death, by his heirs or devisees. *Brewster v. Weston*, 14.

In an action of tort for personal injuries suffered by a person under guardianship as an insane person brought in the name of the guardian it was said

Insane Person (continued).

that the action should have been brought in the name of the insane person by her next friend, and not in the name of the guardian; but, no objection having been raised by the defendant, this court treated the action as duly brought in the name of the insane person by her guardian. *Healy v. Boston Elevated Railway*, 180.

Guardian of an insane person, see GUARDIAN.

INSURANCE.

Life.

Findings of a judge upon a bill of interpleader brought by an insurer in a policy of life insurance which had been assigned by the insured and the beneficiary under the policy "In Consideration of Fifteen Hundred Dollars to us paid," to one from whom the insured had borrowed that sum of money and delivered a promissory note bearing his signature and the forged signature of the beneficiary which it was held must be assumed to be warranted by the evidence, which was not reported. *Connecticut Mutual Life Ins. Co. v. Allen*, 187.

In the same suit it also was held that, a finding being warranted that the assignee held the policy as a pledge for the payment of money advanced and interest by virtue of an assignment executed by the beneficiary under the policy, his claim, to the extent of the amount due him, was superior to the claim of the trustee in bankruptcy, which was no greater than that of the beneficiary, and that a refusal to rule that the assignee "could not recover" was proper. *Ibid.*

Of Motor Vehicle.

In an action against an insurance company by one of two persons upon a policy of insurance insuring them "as their interest may appear" against loss of an automobile by theft, and containing a condition that failure to give notice of loss within a certain time shall render a claim of loss void, if neither person gives the required notice after the theft of the automobile, neither person has any enforceable right under the policy and a payment by the company to one of the insured persons of the amount of his loss is a mere gratuity and does not operate as a relinquishment by the company of the right to insist that a failure by the other person to give the required notice was a bar to an action by him upon the policy. *Navickis v. Fireman's Fund Ins. Co.* 256.

INTERSTATE COMMERCE.

Evidence in a suit in equity by a corporation organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, the principal business of which was the buying of milk from farmers, transporting it to Boston and there selling it by daily deliveries to retail dealers and consumers, seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, where it

appeared that the corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts it was held that the corporation ceased to be engaged in interstate commerce as to the milk when, after its arrival in Boston, it changed the method of dealing with and disposing of it. *H. P. Hood & Sons v. Commonwealth*, 572.

In the above described suit it was held that the statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution. *Ibid.*

Evidence in the above described suit upon which it was held that the transactions with the milk after its arrival in Boston were domestic transactions, and net income derived therefrom was subject to the tax imposed by the statute. *Ibid.*

INTOXICATING LIQUORS.

Evidence in an action to recover the penalty prescribed in R. L. c. 100, § 62, for allowing the plaintiff's minor son to loiter upon premises where intoxicating liquor was sold, which was held sufficient to warrant a finding that the plaintiff's son was allowed by the defendant to loiter on the premises and to entitle the plaintiff to recover the penalty prescribed in R. L. c. 100, § 62. *Malhoit v. Burns*, 559.

R. L. c. 100, § 62, creates three separate and distinct causes of action. *Ibid.*

In an action to recover penalties prescribed in R. L. c. 100, § 62, recovery on a count alleging a sale of intoxicating liquor to a minor on a certain date does not bar recovery on another count which alleges that on the same date the minor was permitted to loiter on the premises where the sale was made. *Ibid.*

INVITED PERSON.

See that subtitle under NEGLIGENCE.

JOINT TENANTS AND TENANTS IN COMMON.

Sole and uninterrupted possession of land, owned in common, by one of the tenants in common with appropriation by him of the profits with the knowledge of the others, if continued for a long series of years, unexplained and uncontrolled by any evidence tending to show a reason for the failure of the other tenants in common to assert rights, furnishes evidence upon which an inference of an actual ouster and adverse possession may and ought to be drawn. *Nickerson v. Nickerson*, 348.

JUDGMENT.

Circumstances under which it was held that the denial of a motion by the defendant to vacate a judgment entered for the defendant in an action of contract, in which after rescript the plaintiff filed a discontinuance, must be affirmed. *Marsch v. Southern New England Railroad*, 304.

JURISDICTION.

Circumstances under which it was held in an action of contract upon a recognition given in a poor debtor proceeding that the magistrate had power to reconsider his first decision and to correct an error of law. *Sallinger v. Hughes*, 104.

The jurisdiction of the Appellate Division of the Municipal Court of the City of Boston, conferred by St. 1912, c. 649, § 8, as amended by St. 1914, c. 35, § 3, extends only to actions in which there is no right of appeal to the Superior Court. *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114.

A ruling upon a matter of law by a judge of the Municipal Court of the City of Boston in a writ of review in the Municipal Court of the City of Boston is not subject to report to the Appellate Division. *Ibid*.

Upon a bill in equity for instructions by the trustees under a declaration of trust executed in Massachusetts by a single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit. *Greenough v. Osgood*, 235.

One employed on a ship as ship's cook and seaman, who receives personal injuries when boarding his ship in tidewater by reason of the breaking of a defective ratline, which properly was being used by him and which should have been kept in a safe condition by the owner of the ship, may recover damages for his injuries in an action of tort at common law against the owner of the vessel in the Superior Court, such right being reserved by the provisions of 36 U. S. Sts. at Large, 1091, 1161, saving "to suitors in all cases," from the exclusive jurisdiction of all "causes of admiralty and maritime jurisdiction" vested in the federal courts, "the right of a common law remedy where the common law is competent to give it." *Proctor v. Dillon*, 538.

Under St. 1903, c. 417, § 6, neither the board of gas and electric light commissioners nor their successors, the commissioners of the department of public utilities, have power or jurisdiction to refuse approval of a contract by the Boston Consolidated Gas Company for the purchase of gas if the price to be paid therefor "is less than it would cost said Boston Consolidated Gas Company to make its gas in gas works of standard type properly equipped, suitably situated and of sufficient capacity to make all the gas required by the whole district supplied by said company. *Boston Consolidated Gas Co. v. Department of Public Utilities*, 590.

Evidence upon which it was held that the board of gas and electric light commissioners, upon a price to be paid by the Boston Consolidated Gas Company to another company for gas being submitted to them for approval under St. 1903, c. 417, § 6, have no power nor jurisdiction to disapprove of the price. *Ibid*.

EQUITY JURISDICTION, see that title.

JURY AND JURORS.

At the trial of an indictment, it is proper to refuse to instruct the jury that "Each juror shall render his own independent judgment and, although giving due consideration to the opinions of the other jurors, he shall not acquiesce in the same or be unduly influenced thereby." *Commonwealth v. Hassan*, 26.

Proceedings before grand jury, see appropriate subtitle under PRACTICE, CRIMINAL.

LABOR AND LABOR UNION.

A contract submitted by a labor union to an employer, whereby, after its acceptance, preference in employment would be given to union workmen by notifying the union officials when additional journeymen and apprentices were needed and all contracts of employment would be submitted and executed in accordance with the union's by-laws and constitution, in effect would force the employer to maintain a shop in which were employed only union workmen, although the contract also provided that, if the union could not furnish and supply competent help, the employer might secure such help from other sources. *Folsom Engraving Co. v. McNeil*, 269.

In a suit in equity brought by an employer against the officers and members of a labor union which had called a strike in the employer's shop, established picketing and caused letters to be sent to the employer's customers and employees urging a boycott of the employer, where it appeared that the picketing was conducted in a coercive manner with threats and scurrilous language for the purpose of rendering the employment of the employees uncomfortable or unbearable and of causing them to leave their employment, and that the purpose of the strike and boycotting letters was to compel the employer to accept the union agreement, it was held that the purpose of the strike was unlawful. *Ibid.*

In the same suit it was held that the officers and members of the union were not protected by St. 1913, c. 690, which was applicable only to a lawful strike lawfully conducted. *Ibid.*

In the same suit it also was held that the employer was entitled to injunctive relief. *Ibid.*

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

Upon an appeal from a decree of the Land Court, entered upon findings in a master's report to which there were no objections or exceptions, the only question open is, whether the decree is warranted by the pleadings and the facts found by the master. *Larsen v. Dillenschneider*, 56.

Evidence in a petition for registration of the title to land brought in 1918 by the sole heir of the grantee in a deed of 1865 from the sisters of the grantee which was void because their husbands did not join therein nor assent thereto upon which it was held that a finding by the judge of the

Land Court that as to one of his sisters and her heirs the petitioner had gained a title by adverse possession was warranted. *Nickerson v. Nickerson*, 348.

LANDLORD AND TENANT.

Peaceful Possession.

Evidence in a suit in equity by a lessee to enjoin a lessor from tearing down the leased premises and erecting a new building where it appeared that the lessee orally agreed with the lessor to surrender possession of the leased premises and to accept other premises furnished by the lessor and that the lessee intentionally refrained from putting his agreement in writing, intending to take advantage of that fact later, it was held, without determining whether there had been a surrender of the premises by the lessee, that a decree dismissing the bill was well warranted. *Peoples Express, Inc. v. Quinn*, 156.

Landlord's Liability for Injuries to Tenant and Members of Tenant's Family.

The landlord of an apartment house is not liable to a child of a tenant for personal injuries caused by his falling through a defective gate into an unused dumb-waiter well around which was built a stairway used in common by the tenants of the house, if it appears that the defect in the gate existed when the tenancy began and that its existence was not known to the landlord. *DE COURCY, J.*, dissenting. *Angevine v. Hewitson*, 126.

Evidence in an action of tort brought by a tenant against a landlord to recover for personal injuries caused by an explosion of a defective hot water coil in a hot air furnace upon which it was held that the rule of *caveat emptor* applied and there was no implied warranty by the defendant that the premises were fit for use. *Mansell v. Hinds*, 253.

In the same action it was held that even if it be assumed that the defect was hidden and not ascertainable by the plaintiff upon examination preceding the tenancy the verdict was rightly ordered, since there was no evidence of knowledge by the defendant of the concealed defect or of facts which would put him upon notice. *Ibid.*

Landlord's Liability in Tort to Persons invited upon Premises

In an action for personal injuries caused by slipping on ice alleged to have accumulated, by reason of the defendant's negligence, upon land of the defendant adjacent to the approach to a post office which occupied under a lease a portion of a building of the defendant, it was held that a certain instruction bearing upon the lessee's liability was not open to objection, and that no substantial error in the charge resulting in a mistrial was shown. *Chestnut v. Sawyer*, 46.

Eviction.

One who is occupying real estate under a lease in writing cannot maintain a suit in equity to enjoin the lessor from compelling him to vacate the premises in accordance with a condition in the lease giving the lessor a right of re-entry upon a failure of the lessee to pay rent as called for by the lease, where it appears that the plaintiff's failure to pay his rent when due was so settled a habit as to be described rightly as a general course of conduct

and that the circumstances of continued delay were annoying in nature and were accompanied by frequent drawing of checks when there were no funds to meet them. *Darviris v. Boston Safe Deposit & Trust Co.* 76.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

In an action of tort for slander, where the plaintiff alleged in the declaration that the defendant "in the Italian language" called her "buttana," which in the English language meant a whore and the plaintiff's evidence tended to show that the word was used in the presence of others who understood its meaning and that it was in the Sicilian dialect, it was held, that a finding for the plaintiff was warranted. *Bellingheri v. Aliosi*, 146.

LICENSE.

St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional. *Burgess v. Mayor & Aldermen of Brockton*, 95.

Where an ordinance, enacted, before the enactment of St. 1919, c. 371, by the city of Brockton, which had accepted the provisions of St. 1916, c. 293, provided that the licensing authorities might suspend or revoke any license granted for the use of a motor vehicle for hire "for violation of any law of the Commonwealth made in relation to the operation of motor vehicles, or violation of any traffic ordinance of said City . . . or violation of any of the rules, restrictions, requirements or regulations herein prescribed or for any other cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient," it was held that a license granted under the provisions of the ordinance might be revoked without the licensee being given notice or a hearing. *Ibid.*

Where the rights given to one who has been granted a license to conduct a certain business are dependent wholly upon the terms of a statute or an ordinance, and such statute or ordinance contains a provision for revocation of the license but, neither expressly nor by fair implication, any requirement that, before such revocation, the licensee shall be entitled to a notice or to a hearing, the rights under the license may be cut off by a revocation without a notice or a hearing. *Ibid.*

In the same case it was held that the fact that the licensees had made investments for the conduct of their business in reliance upon a continuance of their business made their licenses no less revocable under the provisions of the ordinance. *Ibid.*

The power, given by the provisions of St. 1916, c. 293, § 1, before the enactment of St. 1919, c. 371, to such cities and towns as should accept its provisions, "to license and regulate the transportation of passengers for hire

License (*continued*).

as a business between fixed and regular termini by means of any motor vehicle, [with certain exceptions,]" imposes no obligation upon such municipalities to grant any licenses. *Burgess v. Mayor & Aldermen of Brockton*, 95.

LIEN.

MECHANIC'S LIEN, see that title.

LIMITATIONS, STATUTE OF.

An action brought in this Commonwealth against surviving non-resident executors of the will of a testator who died domiciled in this Commonwealth, the writ in which is served upon a new resident agent within two months after the filing of his appointment in the registry of probate, he having succeeded a resident agent who was appointed by the executor within six months after they had filed their bonds, is not barred by the provisions of R. L. c. 141, § 9, as amended by St. 1914, c. 699, § 3, although it is not commenced within one year from the time of the filing by the defendants of their bonds as executors. *J. Cushing Co. v. Brooklyn Trust Co.* 171.

It seems that, under the provisions of R. L. c. 202, § 14, the statute of limitations is a bar to an action upon a promissory note payable upon demand, brought more than six years after its date against one of two makers who has not acknowledged the debt nor promised in writing to pay it, although his joint maker has made payments upon the note within six years before the action was begun. *Fletcher v. Sturtevant*, 249.

If no demand for the payment of a promissory note, payable upon demand, has been made during more than six years after its date upon one who merely signed his name upon its back before its delivery, and who therefore by R. L. c. 73, § 80, is deemed to be an indorser, an action thereafter begun against him upon the note is barred by the statute of limitations, R. L. c. 202, § 2, cl. 1, § 14, although the maker of the note has made payments upon it within six years of the bringing of the action. *Ibid.*

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held that the suit was not barred by the statute of limitations. *Glover v. Waltham Laundry Co.* 330.

Where land owned by a married woman was conveyed in 1863 by a deed of her husband, in which she joined for release of dower, to one who, and his sole heir after him, occupied it openly and adversely until 1918, when the heir petitioned the Land Court for a registration of the title, the widow died in 1889, leaving surviving her her husband and children of their union, and the husband died in 1900, it was held that the statute of limitations did not begin to run against the heirs of the married woman until the termination of the life estate in 1900. *Nickerson v. Nickerson*, 348.

Where a married woman executed a deed of land in 1865 in which her husband did not join and to which he did not assent in writing, and the grantee at once entered into possession of the land and she died in 1889, leaving surviving her her husband and children of their union, and the husband died in 1900, it was held that until the termination by her husband's death of his

tenancy by curtesy, the statute of limitations did not begin to run against her heirs' right in the land, which arose from the fact that her deed was void. *Nickerson v. Nickerson*, 348.

MALICIOUS INTERFERENCE.

See UNLAWFUL INTERFERENCE.

MALICIOUS PROSECUTION.

Evidence at the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, where it appeared that a police officer called by the manager of the hotel caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless, upon which it was held that a finding was warranted that the officer was constituted the agent of the defendant to arrest the plaintiff and to institute against her whatever criminal proceedings in his opinion could be sustained in any view of the acts of the plaintiff at the restaurant. *Mason v. Jacot*, 521.

Evidence in the above described action upon which it was held that the making of a complaint for drunkenness might fairly be regarded as within the terms of the discretion given to the police officer under all the circumstances. *Ibid.*

In the same action it was held that it could not be said that a finding was not warranted that the agents of the defendant, acting within the scope of their authority, without reasonable cause and upon an improper motive, set in motion the train of causation which naturally and proximately resulted in the arrest and accusation of the plaintiff. *Ibid.*

MARRIAGE AND DIVORCE.

Where, at the trial of an action in Massachusetts on a judgment awarded the plaintiff by the Supreme Judicial Court of Maine in a libel for divorce, the laws of Maine relating to actions between husband and wife are not in evidence, the laws of Massachusetts govern. *Golder v. Golder*, 261.

In the absence of proof that the laws of Maine authorize actions between husband and wife, a woman cannot maintain in this State, during the pendency of a libel for divorce brought by her in Maine, an action against her husband upon a judgment of a Maine court for arrearage of alimony ordered to be paid to her *pendente lite*. *Ibid.*

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department

to be called the "Pratt School of Naval Architecture and Marine Engineering" under which it was held in a suit in equity for the sale of real estate by the residuary devisee that the trust estate vested in the Institute with the receipt of the funds. *Massachusetts Institute of Technology v. Attorney General*, 288.

A direction or condition in the will above described that the building should be erected forthwith by the Institute after the receipt of the fund was held a requirement that it should be erected within a reasonable time, having regard to the circumstances. *Ibid.*

In the same suit it was held that the erection of a building, during the World War, such as the state of development of naval architecture and marine engineering demanded, would have required an expenditure of money entirely disproportionate to the fund, and would have left an income inadequate to maintain the building or the school. *Ibid.*

Provisions in the will above described under which it was held that the legal title and the equitable title came into existence at once on the death of the testator, subject to the administration of the estate and the accumulation of principal and income to the net amount of \$750,000 within twenty-one years. *Ibid.*

Provisions in the same will under which it was held that the entire residue of the estate, that is, all the estate except so much as was needed to be set apart to insure the payment of the life interest and the annuities, formed a trust for charitable uses, subject to be divested if the principal and accumulated income did not amount to \$750,000 on or before the expiration of twenty-one years. *Ibid.*

The fund which was formed by the will above described was not limited upon a life estate, but was all the rest and residue of property owned by the testator, some of which was subject to the life interests of individuals. *Ibid.*

The provisions of the will above described constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust. *Ibid.*

In the same suit it was held, that a direction to erect a memorial of bronze in the interior of the building was a mere incident in the construction of the building; and the testator's motive to commemorate himself and family did not prevent the main purpose from being charitable. *Ibid.*

Where in a will, from the provisions of which it was clear that the purpose of the testator was to found and endow a school of naval architecture and marine engineering, the only provision touching directly upon the nature of instruction to be given in the school read, "and said 'Pratt School' is to be forever devoted to the education and training of such young men of all classes in life as may seek instruction in naval architecture and marine insurance" it was held that it was plain that the word "insurance" was used inadvertently, and should be stricken out. *Ibid.*

The next of kin of the testator in the will above described contended that they, and not the Massachusetts Institute of Technology, were entitled to any surplus above \$750,000 under the provisions of the will, but it was held that the manifest intent of the testator was to give the entire rest and residue of his estate to the charitable purpose defined in the will, subject only to the limitation that it should not be paid until it and the accumulated income

reached the limit set, \$750,000, within twenty-one years after his decease. *Massachusetts Institute of Technology v. Attorney General*, 288.

A trustee, to whom has been devised and bequeathed real and personal property under a will of which he is also executor, and who is exempt from giving surety on his bond as trustee and executor, where the will provides that he is not to transfer the trust property to the beneficiary until it, with accumulations, has attained a certain amount, may acquire, before the allowance of his final account as executor, title to the personal property by any notorious act of himself as executor showing his election to hold the property thereafter as trustee, and, if the combined real and personal property then has attained the designated amount, he may convey the real estate to the beneficiary, who will thereby acquire a valid title. *Ibid.*

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability*; WORKMEN'S COMPENSATION ACT.

MECHANIC'S LIEN.

A premium upon a policy of insurance against liability, issued to a contractor constructing a public building or work, is not labor or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77. *Bay State Dredging & Contracting Co. v. W. H. Ellis & Son Co.* 263.

A staging and falls, used in the work of painting and plastering a public pier and steel shed but not made a part thereof, are not labor performed or furnished or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77. *Ibid.*

In a suit brought by creditors to recover under R. L. c. 6, § 77, for labor performed or furnished and materials used on the construction of a public work consisting of a pier and steel shed for the city of New Bedford, including a driveway on the pier, where it appeared that the work excepting the driveway was completed on a September 4 by the original contractor and the driveway was completed in October by another contractor, it was held that the work referred to in the statute embraced the entire work contracted for when the security was given, whether completed by the original contractor or by another, and that claims filed at any time previous to sixty days after the completion of the driveway were seasonably filed. *Ibid.*

MEDICINE.

One, who, without being authorized or registered as a practitioner of medicine under the provisions of R. L. c. 76, § 8, held himself out as a "Doctor of Ophthalmology," printing after those words, following his name on his billheads, the words, "(McCormick Medical College, Chicago)," and "Nervous Systems Measured and Analyzed. Glasses Fitted for Eye Defects," and who first examined eyes through an instrument called the ophthalmoscope, next placed a try-frame on the nose of the patient in which were inserted successively various lenses, and then fitted glasses for the

patient, may be found to be holding himself out as a practitioner of medicine contrary to the provisions of the statute. *Commonwealth v. Houtenbrink*, 320.

MINOR.

See INFANT.

MISTAKE.

Misconception of the legal effect of the language used in a declaration of trust is not a "mistake of law" entitling the settlor to maintain a suit in equity to reform the instrument. *Coolidge v. Loring*, 220.

An instrument will not be reformed on the ground of mistake except upon full, clear and decisive proof of the mistake. *Ibid.*

A declaration of trust which placed upon the trustees important contractual duties and responsibilities will not be reformed by reason of a mistake in which it is not shown that the trustees participated. *Ibid.*

Evidence upon which it was held that a suit in equity could not be maintained by the settlors under a declaration of trust to reform the instrument so that it would permit them to terminate the trust by a surrender of their life interests to the remaindermen, the settlors alleging that appropriate language for that purpose was omitted from the instrument through mistake. *Ibid.*

MONOPOLY.

Neither the provisions of an ordinance concerning the licensing and operation of motor vehicles used for the transportation of passengers for hire nor the action of the licensing authorities in revoking the licenses granted thereunder in order that the service of the public by the trustees of a street railway company might not be discontinued contravened the principles of the common law or of the statute relating to monopolies. *Burgess v. Mayor & Aldermen of Brockton*, 95.

MORTGAGE.

Of Personal Property.

A mortgage of goods, given to secure the payment of a note which bore the same date as the mortgage and which was delivered to the mortgagee upon his surrendering several overdue and unpaid notes previously given to him by the mortgagor for sums of money lent by the mortgagee on the dates of the several notes, is supported by a valuable consideration. *Entin v. Evans*, 43.

One, who in good faith and without notice of any fraud on the part of the mortgagor received a mortgage of goods, which was given to him upon his surrendering overdue and unpaid notes previously given to him by the mortgagor for sums lent from time to time before the giving of the mort-

gage, may maintain an action of tort for conversion of the goods against a sheriff whose deputy had seized and, after a demand by him, had retained the goods upon a writ of replevin brought against the mortgagor by one who had sold the goods to the mortgagor and had rescinded the sale by reason of the mortgagor's fraud. *Entin v. Evans*, 43.

Of Real Estate.

- A wife, who, for the purpose of releasing her rights of dower and homestead and rights given her by statute, joined with her husband in a mortgage of real estate owned by him, may maintain a bill in equity to redeem the real estate from the mortgage. *Ryder v. Brockton Savings Bank*, 476.
- A wife's inchoate right of dower in real estate of her husband gives her no right to maintain a bill in equity to redeem real estate of his from a mortgage made by him in which she did not join. *Ibid.*
- While one, who has an attachment upon real estate subject to a mortgage, has a right to redeem from the mortgage, if, without making to the mortgagee any tender of the amount due upon the mortgage obligation, he permits the property to be sold at a sale duly conducted in execution of a power of sale in the mortgage deed giving the mortgagee the privilege of becoming a purchaser at the sale, his right of redemption is lost, although he attended and was a bidder at the sale and the mortgagee became the purchaser. *Ibid.*
- A sale in foreclosure of a mortgage of real estate is not rendered invalid by the facts, that the mortgagee was actuated by the purpose and intention not merely of procuring what was due him under the mortgage but also of procuring the property as his own and of excluding both the mortgagor, and his wife therefrom, both when he took the mortgage, in which the mortgagor's wife did not join because she was estranged from him, and later when, upon foreclosure under a power of sale which gave him the privilege of purchasing at the foreclosure sale, he outbid the wife at the sale and purchased the property. *Ibid.*

MOTOR VEHICLE.

License to operate for Hire.

- St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional. *Burgess v. Mayor & Aldermen of Brockton*, 95.
- A revocation by the mayor and aldermen of Brockton of a license to operate a motor vehicle granted under an ordinance of the city of Brockton which it was held was reasonable and valid. *Ibid.*
- In the same case it was held that a license granted under the provisions of the ordinance might be revoked without the licensee being given notice or a hearing. *Ibid.*
- In the same case it was held that the fact that the licensees had made investments for the conduct of their business in reliance upon a continuance of

Motor Vehicle (continued).

their business made their licenses no less revocable under the provisions of the ordinance. *Burgess v. Mayor & Aldermen of Brockton*, 95.

The power, given by the provisions of St. 1916, c. 293, § 1, before the enactment of St. 1919, c. 371, to such cities and towns as should accept its provisions, "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle, [with certain exceptions,]" imposes no obligation upon such municipalities to grant any licenses. *Ibid.*

Damage resulting from Defect in Highway.

Evidence in an action against a town under St. 1917, c. 344, Part IV, § 24, for personal injuries alleged to have been sustained while driving in a motor car by reason of a want of sufficient railing upon a way approaching a bridge over a river, which warranted a finding that a want of a sufficient railing upon the highway caused the injury to the plaintiff. *Bond v. Bilgerica*, 119.

Evidence in the action above described upon which it was held that it could not be said as a matter of law that the plaintiff's loss of control of the motor car was more than momentary. *Ibid.*

Although a municipality is not required to erect, between a highway and an embankment bordering a river, a railing of sufficient strength to protect a motor vehicle of great weight, as compared to a horse-drawn vehicle, from going over the embankment, it seems that a railing might be found to be sufficient to insure the safety of ordinary travel and therefore sufficient to prevent the municipality from being liable under St. 1917, c. 344, Part IV, § 24, for injury or damage caused by want of a sufficient railing, if it was of a character to prevent a motor car of the type known in November, 1918, as a "Ford touring car" from running over the embankment where, when going at the rate of from twelve to fifteen miles an hour, the car had swerved and, with the clutch thrown out and its brakes set, had crossed the road to the embankment. *Ibid.*

Registration.

The provisions of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, require a registration of a motor vehicle in the name of any part owner who shall operate the vehicle by himself or by his servant. *Shufelt v. McCartin*, 122.

Under the provisions of the statutes above described, registration of a motor vehicle in the name of a part owner thereof, who does not operate it, is insufficient to make lawful operation of such vehicle upon a public way by a co-owner in whose name it is not registered and whose name, place of residence and address are not stated in the application for registration. *Ibid.*

Rights of Guest in Motor Car.

A guest in a motor car which is approaching a grade crossing of a railroad with a highway properly may rely on his host to drive the vehicle while he himself uses his senses to ascertain whether a train is approaching. *Fahy v. Director General of Railroads*, 510.

Insurance.

See that subtitle under INSURANCE.

Negligent Operation.

Cases involving questions of negligent operation of motor vehicles, see appropriate subtitle under NEGLIGENCE.

MUNICIPAL CORPORATIONS.

By-Laws and Ordinances.

Where the rights given to one who has been granted a license to conduct a certain business are dependent wholly upon the terms of a statute or an ordinance, and such statute or ordinance contains a provision for revocation of the license but, neither expressly nor by fair implication, any requirement that, before such revocation, the licensee shall be entitled to a notice or to a hearing, the rights under the license may be cut off by a revocation without a notice or a hearing. *Burgess v. Mayor & Aldermen of Brockton*, 95.

Where an ordinance, enacted, before the enactment of St. 1919, c. 371, by the city of Brockton, which had accepted the provisions of St. 1916, c. 293, provided that the licensing authorities might suspend or revoke any license granted for the use of a motor vehicle for hire "for violation of any law of the Commonwealth made in relation to the operation of motor vehicles, or violation of any traffic ordinance of said City . . . or violation of any of the rules, restrictions, requirements or regulations herein prescribed or for any other cause deemed by said licensing authorities in the exercise of reasonable discretion to be sufficient," it was held that the provisions of the ordinance above quoted were within the scope of the authorization of the statute. *Ibid.*

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

An owner of land cannot maintain a suit in equity to enjoin the erection of a building upon adjoining land which is in violation of a municipal ordinance if such structure is not in itself noxious nor unusually dangerous nor in violation of the private rights of the plaintiff. *O'Keefe v. Sheehan*, 390.

Officers and Agents.

A board of survey, constituted under the provisions of St. 1907, c. 191, by a town which has accepted the provisions of that statute, has no right to erect or to maintain upon unimproved land, owned by a corporation which intended to improve, develop and sell it, a sign containing a warning to

Municipal Corporations (*continued*).

purchasers as to the character of roads which, under the provisions of the statute, would be acceptable to the board. *Lexington Board of Survey v. Suburban Land Co.* 108.

Nor has such a board of survey any right or power conferred by the common law or by statute to erect or maintain such a sign within a highway, the fee to which is owned by a private person who has not granted such a right to the town. *Ibid.*

Under the provisions of St. 1915, c. 145, § 5, no one excepting a tree warden or his deputy may trim, cut or remove a tree within the limits of a highway of a town, even if the tree endangers persons lawfully travelling upon the highway; but, if such tree is a source of danger to travellers on the highway, it is the duty of the town officials to order the tree warden to trim or to cut down the tree and of the tree warden to carry out the order. *Vaseline Oil Co. v. Winthrop*, 515.

Failure of town officials to order the tree warden to cause the removal of a limb of a public shade tree which for a long time so had overhung the travelled portion of a highway as to be a source of danger and an obstruction to the travelling public, and to give such warning to travellers on the way as would protect them while the tree warden was carrying out the order, will render the town liable for damages resulting from a traveller in a wagon upon the highway running into the limb. *Ibid.*

Contracts.

In a suit in equity by the town of Oak Bluffs against the Cottage City Water Company, organized under St. 1890, c. 151, to enjoin the defendant from charging for water supplied to domestic consumers in the town a rate higher than that stated in the schedule annexed to an agreement between the town and the company, made in 1910, the plaintiff alleged and contended that that agreement provided that the rate stated in its schedules should be maintained by the defendant unchanged for twenty years, and, in determining the case, it was assumed, without so deciding, that the town had authority to enter into a proper contract with the company respecting water rates to be charged for domestic consumption. *Oak Bluffs v. Cottage City Water Co.* 18.

In the suit above described it was held that the rates to be charged to domestic consumers were not fixed by the contract for the entire term of twenty years, and that the company might raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Ibid.*

Power to License and to Revoke License.

St. 1916, c. 293, § 1, empowering such cities and towns as should accept its provisions "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle," with certain exceptions, was a valid exercise of the police power and was constitutional. *Burgess v. Mayor & Aldermen of Brockton*, 95. Where the rights given to one who has been granted a license to conduct a certain business are dependent wholly upon the terms of a statute or an

ordinance, and such statute or ordinance contains a provision for revocation of the license but, neither expressly nor by fair implication, any requirement that, before such revocation, the licensee shall be entitled to a notice or to a hearing, the rights under the license may be cut off by a revocation without a notice or a hearing. *Burgess v. Mayor & Aldermen of Brockton*, 95.

A revocation by the mayor and Aldermen of Brockton of a license granted under an ordinance of the city of Brockton which it was held was reasonable and valid. *Ibid*.

In the same case it was held that the fact that the licensees had made investments for the conduct of their business in reliance upon a continuance of their business made their licenses no less revocable under the provisions of the ordinance. *Ibid*.

The power, given by the provisions of St. 1916, c. 293, § 1, before the enactment of St. 1919, c. 371, to such cities and towns as should accept its provisions, "to license and regulate the transportation of passengers for hire as a business between fixed and regular termini by means of any motor vehicle, [with certain exceptions,]" imposes no obligation upon such municipalities to grant any licenses. *Ibid*.

Board of Survey.

A board of survey, constituted under the provisions of St. 1907, c. 191, by a town which had accepted the provisions of that statute, has no right to erect or to maintain upon unimproved land, owned by a corporation which intended to improve, develop and sell it, a sign containing a warning to purchasers as to the character of roads which, under the provisions of the statute, would be acceptable to the board. *Lexington Board of Survey v. Suburban Land Co.* 108.

Nor has such a board of survey any right or power conferred by the common law or by statute to erect or maintain such a sign within the highway, the fee to which is owned by a private person who has not granted such a right to the town. *Ibid*.

If, upon the filing by a landowner of plans relative to the laying out of streets over certain land with a board of survey under the provisions of St. 1907, c. 191, the board is not satisfied with the plans, their powers and duties then are, not to reject the plans, but to alter them, determine where the streets should be located and what their widths and grades should be and, having so indicated on the plans, to approve and sign the plans as changed. *Ibid*.

St. 1907, c. 191, does not confer upon a board of survey a right to maintain a suit in equity to restrain an owner of land from laying out and constructing streets therein because he has not complied with the provisions of the statute relating to the filing of plans with the board. *Ibid*.

Defects in Ways.

Liability of municipalities for defects in highways, see appropriate subtitle under WAY.

MUNICIPAL COURT OF THE CITY OF BOSTON.

No appeal lies from a denial by the Appellate Division of the Municipal Court of the City of Boston of a petition to establish the truth of a report which, upon its presentation for allowance to the trial judge of the court, had been disallowed by him. *Jackson Caldwell Co. v. Poto*, 58.

The right of appeal to the Superior Court from a judgment entered in the Municipal Court of the City of Boston in an action which was brought there by compulsion of law and not by election was not affected by the provisions of St. 1912, c. 649, § 2, as amended by St. 1914, c. 35, § 2; c. 409. *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114.

The jurisdiction of the Appellate Division of the Municipal Court of the City of Boston, conferred by St. 1912, c. 649, § 8, as amended by St. 1914, c. 35, § 3, extends only to actions in which there is no right of appeal to the Superior Court. *Ibid.*

A ruling upon a matter of law by a judge of the Municipal Court of the City of Boston in a writ of review in the Municipal Court of the City of Boston is not subject to report to the Appellate Division. *Ibid.*

Upon an appeal from the Appellate Division of the Municipal Court of the City of Boston in an action upon an assignment of wages, where it appeared that the trial judge erroneously refused to make a certain ruling requested by the plaintiff this court determined that, although the ruling asked for was a correct statement of the law, the plaintiff was not harmed by its refusal and ordered judgment for the defendant. *Gilman v. Raymond*, 284.

MURDER.

See HOMICIDE.

NAME.

TRADE NAME, see that title.

NEGLIGENCE.

Plaintiff's Due Care: Contributory Negligence.

Evidence at the trial of an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate, which it was held warranted a finding that the defendant was negligent and that the plaintiff's intestate was actively looking out for her own safety. *Kaminski v. Fournier*, 51.

Evidence in an action of tort for damages resulting to a woman about sixty-five years of age in December, 1916, in crossing a street in a city containing double tracks of a street railway, from a collision with a street car, upon which it was held that the question, whether she was exercising reasonable care for her safety, was for the jury. *Healy v. Boston Elevated Railway*, 150.

At the trial of an action of tort against a street railway company for the loss of a

horse caused by injuries received when he was on the highway in the care of the plaintiff's daughter, it is proper to exclude as immaterial evidence tending to show that with the plaintiff's knowledge the horse had been upon the highway unattended a number of times previous to the accident. *Kadra v. Middlesex & Boston Street Railway*, 176.

It is not negligent as a matter of law to drive at night upon tracks of a street railway, which are upon but at the side of a highway and are outside the part of the way used for travel, when there is deep snow upon the travelled part of the way and the street railway tracks are cleared. *Herman v. Middlesex & Boston Street Railway*, 179.

Evidence at the trial of an action against a street railway company for injuries resulting from a collision after six and before seven o'clock in an evening in January, 1916, between a wagon driven by the plaintiff and an electric street railway car of the defendant upon which it was held that it could not be ruled as a matter of law that the conduct of the plaintiff constituted contributory negligence. *Ibid.*

Evidence in an action against the owner of a motor truck used for delivering ice cream manufactured by the defendant, for personal injuries, received by the plaintiff in 1917 when riding on the running board of the truck and caused by negligence of the driver, upon which it was held that the question, whether the plaintiff was negligent in riding on the running board, was for the jury. *Coyne v. Maniatty*, 181.

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries received when the plaintiff, as he was crossing a highway after St. 1914, c. 553, was enacted, was run into by the vehicle, upon which it was held that a ruling requested by the defendant that, upon all the evidence, the plaintiff was guilty of contributory negligence, properly was refused. *Quinlan v. Hugh Nawn Contracting Co.* 190.

A ruling requested by the defendant in the above described action that, "If, before the plaintiff started to cross the street, he looked and did not see the automobile, and if you find that the automobile must have been within his view, then, as a matter of law, he looked carelessly and if that contributed to his accident the plaintiff is not entitled to recover" was held properly refused, since it singled out and emphasized only a part of the salient features of the evidence. *Ibid.*

Evidence at the trial of an action against a street railway company in a city by a passenger upon one of its open cars for injuries resulting from contact with a chemical solution which had been used by firemen of the city fire department to extinguish a fire on an overhead structure of the defendant which was held fully warranted the jury in finding that the plaintiff was in the exercise of due care in remaining in her seat during the time the car was at a standstill and when it moved. *Flaherty v. Boston Elevated Railway*, 422.

Evidence in an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets upon which it was held that there was evidence that the driver of the motor vehicle was in the exercise of due care. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

Evidence at the trial of an action by a guest in a motor car, approaching a

Negligence (continued).

grade crossing of a railroad with a highway, to recover for injuries sustained by him in jumping from the motor car to avoid a collision with an approaching train upon which it was held that rulings asked for by the defendant in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff properly were refused, because it could not be said as a matter of law that the plaintiff entrusted himself wholly to the care of his host. *Fahy v. Director General of Railroads*, 510.

Evidence in the action above described upon which it was held that it could not be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence. *Ibid.*

Imputed.

Evidence at the trial of an action by a guest in a motor car approaching a grade crossing of a railroad with a highway, to recover for injuries sustained by him in jumping from the motor car to avoid a collision with an approaching train upon which it was held, that rulings asked for by the defendant in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff properly were refused, because it could not be said as a matter of law that the plaintiff entrusted himself wholly to the care of his host. *Fahy v. Director of General Railroads*, 510.

Evidence in the action above described upon which it was held that it could not be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence. *Ibid.*

It not being denied, in the action above described, that the plaintiff was a guest of the driver of the motor car, a request for a ruling that he and the driver were engaged in a joint enterprise and therefore that he was bound by the driver's neglect, properly was refused. *Ibid.*

Invited Person.

Evidence at the trial of an action against a railroad company for personal injuries caused by a bundle of newspapers, pushed from a baggage car by an employee of the defendant, falling upon the plaintiff, who was at the door of the car to receive the papers for his employer, which was held warranted a finding that the plaintiff, when injured, was at the baggage car door with the rights of one invited by the defendant to be there. *Belyea v. New York, New Haven, & Hartford Railroad*, 225.

Employer's Liability.

Evidence in an action by the administrator of the estate of a boy eighteen years of age, who had entered employment in a retail dry goods establishment and, thirty-two days later, was struck on the head by an ascending dumb-waiter used to carry small parcels from the second floor to the ship-

ping department in the basement, and who afterwards died from the injuries thus received, against the proprietors of the store for the causing of his conscious suffering and death through negligence, upon which it was held that the defendant was under no duty to warn or instruct the plaintiff's intestate as to the obvious dangers attending the use of the dumb-waiter and that a finding of negligence on the part of the defendant was not warranted. *Cullity v. Johnson*, 137.

Evidence at the trial of an action against a railroad corporation by an employee under the federal employers' liability act for personal injuries received when helping to unload a motor car from a platform, built above two other motor cars also being transported in a freight car ordinarily used for transporting coal, and six inches below the top of the sides of the freight car, upon which it was held that it could not be said as a matter of law that the risk of harm from the drop of the rear end of the motor car was obvious and was assumed by the plaintiff as an incident to his employment. *Leary v. New York Central Railroad*, 432.

In the action above described it also was held that a finding was warranted that the foreman was negligent in insisting upon the car being hoisted before the plaintiff could "have a look" at the slack rear rope. *Ibid*.

The allegation in a declaration in an action of tort by one employed as ship's cook and seaman against the owner of the ship for personal injuries received when boarding his ship in tidewater by reason of the breaking of a defective ratline that the condition of the ratline arose "by reason of the negligence" of the defendant, and an instruction to the jury at the trial which required the plaintiff, in order to recover, to prove negligence of the defendant with respect to the ratline, were not harmful to the defendant. *Proctor v. Dillon*, 538.

If a member of the crew of a ship, which belongs to two owners and is managed by only one of them, receives personal injuries while in tidal waters by reason of a defective condition of a ratline which it was the duty of the owners to keep in a fit condition, he may recover full compensatory damages in an action against the managing owner only. *Ibid*.

Street Railway.

Person on highway.

It is not negligent as a matter of law to drive at night upon tracks of a street railway, which are upon but at the side of a highway and are outside the part of the way used for travel, when there is deep snow upon the travelled part of the way and the street railway tracks are cleared. *Herman v. Middlesex & Boston Street Railway*, 179.

Evidence at the trial of an action against a street railway company for injuries resulting from a collision after six and before seven o'clock in an evening in January, 1916, between a wagon driven by the plaintiff and an electric street railway car of the defendant, upon which it was held that it could not be ruled as a matter of law that the conduct of the plaintiff constituted contributory negligence. *Ibid*.

In the same action it was held that the question of negligence of the motor-man was for the jury. *Ibid*.

Evidence in an action against a street railway company for an injury to a

Negligence (*continued*).

motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets upon which it was held that there was evidence that the driver of the motor vehicle was in the exercise of due care. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

At the trial of the action above described where there also was evidence that the motorman saw the motor vehicle when it was one hundred feet away, that he gave no warning of the approach of the street car and did not diminish its speed as it rounded the corner it was held, that there was evidence of the defendant's negligence. *Ibid*.

At the trial of the same action where there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent, and it was held that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction. *Ibid*.

Animal on highway.

At the trial of an action of tort against a street railway company for the loss of a horse caused by injuries received when he was on the highway in the care of the plaintiff's daughter, it is proper to exclude as immaterial evidence tending to show that with the plaintiff's knowledge the horse had been upon the highway unattended a number of times previous to the accident. *Kadra v. Middlesex & Boston Street Railway*, 176.

Elevated Railway.

Person on highway.

Evidence in an action of tort for damages resulting to a woman about sixty-five years of age in crossing a street in a city containing double tracks of a street railway from a collision with a street car, upon which it was held that the question whether she was exercising reasonable care for her safety, was for the jury. *Healy v. Boston Elevated Railway*, 150.

Passenger.

Evidence at the trial of an action against a street railway company in a city by a passenger upon one of its open cars for injuries resulting from contact with a chemical solution which had been used by firemen of the city fire department to extinguish a fire on an overhead structure of the defendant which was held fully warranted the jury in finding that the plaintiff was in the exercise of due care in remaining in her seat during the time the car was at a standstill and when it moved. *Flaherty v. Boston Elevated Railway*, 422.

In the above described action it also was held that in the absence of knowledge that contact with the solution probably would cause harm to a person, neither the inspector nor the motorman was negligent in ordering the car forward or in going ahead with it although drops of the liquid had not entirely ceased to fall from the structure. *Ibid*.

Railroad.

Person at station.

Evidence at the trial of an action against a railroad company for personal injuries caused by a bundle of newspapers, pushed from a baggage car by an employee of the defendant, falling upon the plaintiff, who was at the door of the car to receive the papers for his employer, which was held warranted a finding that the plaintiff, when injured, was at the baggage car door with the rights of one invited by the defendant to be there. *Belyen v. New York, New Haven, & Hartford Railroad*, 225.

In freight yard.

Evidence at the trial of an action against a railroad corporation by an employee under the federal employers' liability act for personal injuries received when helping to unload a motor car from a platform, built above two other motor cars also being transported in a freight car ordinarily used for transporting coal, and six inches below the top of the sides of the freight car, upon which it was held that it could not be said as a matter of law that the risk of harm from the drop of the rear end of the motor car was obvious and was assumed by the plaintiff as an incident to his employment. *Leary v. New York Central Railroad*, 432.

In the action above described it also was held that a finding was warranted that the foreman was negligent in insisting upon the car being hoisted before the plaintiff could "have a look" at the slack rear rope. *Ibid*.

Grade crossing.

Where at the trial of an action against a railroad corporation for personal injuries caused by a collision between a motor car driven by the plaintiff and a locomotive of the defendant at a grade crossing of the railroad with a highway, a request by the plaintiff that the jury be instructed that, "if the defendant's servants neglected to give the signals required by statute to be given at the railroad crossing, the jury might infer that this neglect contributed to the said injuries" was refused, and the jury were instructed that, if they found that the statutory signals were not given, that fact was evidence of negligence, and, if that negligence contributed to the injury, the plaintiff had proved his case so far as the defendant's negligence was concerned it was held that there was no error in the refusal to instruct the jury as requested nor in the instruction given. *Lydon v. New York, New Haven, & Hartford Railroad*, 469.

Evidence in an action by a guest in a motor car, approaching a grade crossing of a railroad with a highway, to recover for his injuries sustained in jumping from the motor car to avoid a collision with an approaching train, against the Director General of Railroads, who was operating the railroad company, where the jury found specially that the signals required by St. 1906, c. 463, Part II, §§ 147, 148, were not given, which was held warranted a finding that omission to give the signals was negligence of the defendant which contributed to the injury to the plaintiff. *Fahy v. Director General of Railroads*, 510.

Evidence at the trial of the action above described upon which it was held, that rulings asked for by the defendant in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff properly were refused, because it could not be

Negligence (continued).

said as a matter of law that the plaintiff entrusted himself wholly to the care of his host. *Fahy v. Director General of Railroads*, 510.

Evidence in the action above described upon which it was held that it could not be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence. *Ibid.*

It not being denied, in the action above described, that the plaintiff was a guest of the driver of the motor car, a request for a ruling that he and the driver were engaged in a joint enterprise and therefore that he was bound by the driver's neglect, properly was refused. *Ibid.*

Motor Vehicle.

Evidence at the trial of an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate, which it was held warranted a finding that the defendant was negligent and that the plaintiff's intestate was actively looking out for her own safety. *Kaminski v. Fournier*, 51.

Evidence at the trial of an action for personal injuries received when the plaintiff, a woman, was crossing a highway in a city and was run into by a motor car operated by the defendant, upon which it was held that a ruling asked for by the defendant, "If the jury find that the plaintiff saw the defendant's car coming, heard his horn, and stood still in the middle of the street for an instant, long enough to see the approaching car, and then started to run across the street in front of the defendant's car, then the plaintiff was not in the exercise of due care and the jury must find for the defendant" properly was refused, both because it disregarded the effect of fright upon the plaintiff and the necessity of instant action in imminent peril; and also because it singled out and emphasized a part only of the controverted evidence and asked for a ruling as to its effect. *Neafsey v. Szemeta*, 160.

Evidence in an action against the owner of a motor truck used for delivering ice cream manufactured by the defendant, for personal injuries, received by the plaintiff in 1917 when riding on the running board of the truck and caused by negligence of the driver, upon which it was held that the question, whether the plaintiff was negligent in riding on the running board was for the jury. *Coyne v. Maniatty*, 181.

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries received when the plaintiff, as he was crossing a highway after St. 1914, c. 553, was enacted, was run into by the vehicle, upon which it was held that a ruling requested by the defendant that, upon all the evidence, the plaintiff was guilty of contributory negligence, properly was refused. *Quinlan v. Hugh Nawn Contracting Co.* 190.

Evidence in an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets upon which it was held that there was evidence that the driver of the motor vehicle was in the exercise of due care. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

At the trial of the action above described where there also was evidence that the motorman saw the motor vehicle when it was one hundred feet away,

that he gave no warning of the approach of the street car and did not diminish its speed as it rounded the corner it was held, that there was evidence of the defendant's negligence. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

At the trial of the same action where there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent, and it was held that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction. *Ibid.*

Evidence at the trial of an action by a guest in a motor car, approaching a grade crossing of a railroad with a highway, to recover for injuries sustained by him in jumping from the motor car to avoid a collision with an approaching train upon which it was held that rulings asked for by the defendant in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff properly were refused, because it could not be said as a matter of law that the plaintiff entrusted himself wholly to the care of his host. *Fahy v. Director General of Railroads*, 510.

In Use of Highway.

Evidence at the trial of an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate, which it was held warranted a finding that the defendant was negligent and that the plaintiff's intestate was actively looking out for her own safety. *Kaminski v. Fournier*, 51.

Evidence in an action by two children for personal injuries caused by being struck by a horse driven by an officer of a corporation conducting a stable in Boston upon which it was held that the question whether the driver, before and after the horse bolted, was in the exercise of that care required of him under the circumstances, was for the jury. *Condelli v. American Stables Co.* 141.

Evidence in an action of tort for damages resulting to a woman about sixty-five years of age in December, 1916, in crossing a street in a city containing double tracks of a street railway, from a collision with a street car, upon which it was held that the question, whether she was exercising reasonable care for her safety, was for the jury. *Healy v. Boston Elevated Railway*, 150.

A ruling requested at the trial of an action for personal injuries received when the plaintiff, a woman, was crossing a highway in a city and was run into by a motor car operated by the defendant, which it was held properly was refused, both because it disregarded the effect of fright upon the plaintiff and the necessity of instant action in imminent peril; and also because it singled out and emphasized a part only of the controverted evidence and asked for a ruling as to its effect. *Neafsey v. Szemeta*, 160.

At the trial of an action of tort against a street railway company for the loss of a horse caused by injuries received when he was on the highway in the care of the plaintiff's daughter, it is proper to exclude as immaterial evidence

Negligence (continued).

tending to show that with the plaintiff's knowledge the horse had been upon the highway unattended a number of times previous to the accident. *Kadre v. Middlesex & Boston Street Railway*, 176.

It is not negligent as a matter of law to drive at night upon tracks of a street railway, which are upon but at the side of a highway and are outside the part of the way used for travel, when there is deep snow upon the travelled part of the way and the street railway tracks are cleared. *Herman v. Middlesex & Boston Street Railway*, 179.

Evidence at the trial of an action against a street railway company for injuries resulting from a collision after six and before seven o'clock in an evening in January, 1916, between a wagon driven by the plaintiff and an electric street railway car of the defendant, upon which it was held that it could not be ruled as a matter of law that the conduct of the plaintiff constituted contributory negligence. *Ibid.*

In the same action it was held that the question of negligence of the motorman was for the jury. *Ibid.*

Evidence at the trial of an action against the owner of a motor vehicle for personal injuries received when the plaintiff, as he was crossing a highway after St. 1914, c. 553, was enacted, was run into by the vehicle, upon which it was held that a ruling requested by the defendant that, upon all the evidence, the plaintiff was guilty of contributory negligence, properly was refused. *Quinlan v. Hugh Nawn Contracting Co.* 190.

A ruling requested by the defendant in the above described action that, "If, before the plaintiff started to cross the street, he looked and did not see the automobile, and if you find that the automobile must have been within his view, then, as a matter of law, he looked carelessly and if that contributed to his accident the plaintiff is not entitled to recover," was held properly refused, since it singled out and emphasized only a part of the salient features of the evidence. *Ibid.*

Of One controlling Real Estate.

The landlord of an apartment house is not liable to a child of a tenant for personal injuries caused by his falling through a defective gate into an unused dumb-waiter well around which was built a stairway used in common by the tenants of the house, if it appears that the defect in the gate existed when the tenancy began and that its existence was not known to the landlord. *DE COURCY, J., dissenting. Angevine v. Hewitson*, 126.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

Evidence in an action of tort brought by a tenant against a landlord to recover for personal injuries caused by an explosion of a defective hot water coil in a hot air furnace upon which it was held that the rule of *caveat emptor* applied and there was no implied warranty by the defendant that the premises were fit for use. *Mansell v. Hands*, 253.

In the same action it was held that even if it be assumed that the defect was hidden and not ascertainable by the plaintiff upon examination preceding the tenancy the verdict was rightly ordered, since there was no evidence of knowledge by the defendant of the concealed defect or of facts which would put him upon notice. *Mansell v. Hands*, 253.

Causing Death.

Evidence at the trial of an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate, which it was held warranted a finding that the defendant was negligent and that the plaintiff's intestate was actively looking out for her own safety. *Kaminski v. Fournier*, 51.

The provisions of R. L. c. 171, § 2, as amended by St. 1907, c. 375, impose no liability upon a public charitable corporation conducting a hospital for the causing of the death of a patient which resulted either through the negligence of the officers of the defendant in selecting incompetent servants or employees or through negligence of servants or employees carefully selected. *Roosen v. Peter Bent Brigham Hospital*, 66.

Evidence in an action by the administrator of the estate of a boy eighteen years of age who was struck on the head by an ascending dumb-waiter used to carry small parcels from the second floor to the shipping department in the basement, and who afterwards died from the injuries thus received, against the proprietors of the store for the causing of his conscious suffering and death through negligence, upon which it was held that the defendant was under no duty to warn or instruct the plaintiff's intestate as to the obvious dangers attending the use of the dumb-waiter and that a finding of negligence on the part of the defendant was not warranted. *Cullity v. Johnson*, 137.

In removing Fence.

At the trial of an action of tort for personal injuries resulting from the fall of an iron fence and alleged to have been caused by the negligence of the defendant in leaving the fence in a dangerous condition while in process of removing it, the defendant is entitled to show that the fall of the fence happened, not through his negligence but because of the acts of others who unlawfully climbed on or loosened or interfered with it, causing it to topple over, and inquiry of witnesses tending to prove that contention is admissible in evidence. *Del Visco v. General Electric Co.* 415.

In driving Horse.

Evidence in an action by two children for personal injuries caused by being struck by a horse driven by an officer of a corporation conducting a stable in Boston upon which it was held that the question, whether the driver, before and after the horse bolted, was in the exercise of that care required of him under the circumstances, was for the jury. *Condelli v. American Stables Co.* 141.

In Use of Dumb-Waiter.

Evidence in an action by the administrator of the estate of a boy eighteen years of age, who had entered employment in a retail dry goods establishment and, thirty-two days later, was struck on the head by an ascending dumb-waiter used to carry small parcels from the second floor to the shipping department in the basement, and who afterwards died from the injuries thus received, against the proprietors of the store for the causing of his conscious suffering and death through negligence, upon which it was held that the defendant was under no duty to warn or instruct the plaintiff's intestate as to the obvious dangers attending the use of the dumb-waiter and that a finding of negligence on the part of the defendant was not warranted. *Cullity v. Johnson*, 137.

Of Bank.

In an action by a bank against the drawer of a check upon it for an overdraft in the drawer's account caused by the negligent payment of the check by the bank after the drawer had given the bank an order to stop its payment it was held that the meaning of an agreement between the bank and the drawer was that the bank should be exonerated from liability to the drawer if, through the kind of negligence described, it paid the check after receiving the notice to stop payment. *Tremont Trust Co. v. Burack*, 398.

Of Carrier of Goods.

Evidence in an action against carriers who, successively, transported the oil from Florida to Maine under the bill of lading above described for damages resulting from the loss of a part of the oil by leakage while in transit which it was held did not warrant a finding of negligence on the part of either defendant. *Florida Cotton Oil Co. v. Clyde Steamship Co.* 10.

Where a through bill of lading for a shipment of cotton seed oil from Florida to Maine by water contained provisions that negligence should not be presumed against the carrier and that the carrier should not be liable for loss of the property "by causes beyond its control . . . or by leakage" the carrier was not liable for the loss of any part of the shipment through leakage unless such loss was caused by the carrier's negligence, and the burden of proving such negligence was upon the shipper. *Ibid.*

Of Officers and Employees of Public Charitable Corporation.

A public charitable corporation operating a hospital is not liable in an action of tort for the conscious suffering of one of its patients caused by negligence, either of its managing officers in selecting incompetent servants and employees or of servants or employees selected with care. *Roosen v. Peter Bent Brigham Hospital*, 66.

The provisions of R. L. c. 171, § 2, as amended by St. 1907, c. 375, impose no liability upon a public charitable corporation conducting a hospital for the causing of the death of a patient which resulted either through the negligence of the officers of the defendant in selecting incompetent servants or employees, or through negligence of servants or employees carefully selected. *Ibid.*

Contract to avoid Liability.

An agreement in writing signed by the drawer of a check, upon giving to a bank upon which it was drawn an order to stop its payment, that he would not hold the bank liable "on account of payment contrary to this request if same occur through inadvertence or accident" was held not contrary to public policy and was valid. *Tremont Trust Co. v. Burack*, 398.

Snow and Ice.

In an action for personal injuries caused by slipping on ice alleged to have accumulated, by reason of the defendant's negligence, upon land of the defendant adjacent to the approach to a post office which occupied under a lease a portion of a building of the defendant it was held that an instruction given by the trial judge relative to liability of the lessee was not open to objection, and that no substantial error in the charge resulting in a mistrial was shown. *Chestnut v. Sawyer*, 46.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

Proximate Cause.

At the trial of an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets where there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent and it was held, that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

Evidence in an action by a guest in a motor car, approaching a grade crossing of a railroad with a highway, to recover for his injuries sustained in jumping from the motor car to avoid a collision with an approaching train, against the Director General of Railroads, who was operating the railroad company, where the jury found specially that the signals required by St. 1906, c. 463, Part II, §§ 147, 148, were not given, which was held warranted a finding that omission to give the signals was negligence of the defendant which contributed to the injury to the plaintiff. *Fahy v. Director General of Railroads*, 510.

Violation of Ordinance as Evidence of Negligence.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor

Negligence (*continued*).

in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

Where the rights given to one who has been granted a license to conduct a certain business are dependent wholly upon the terms of a statute or an ordinance, and such statute or ordinance contains a provision for revocation of the license but, neither expressly nor by fair implication, any requirement that, before such revocation, the licensee shall be entitled to a notice or to a hearing, the rights under the license may be cut off by a revocation without a notice or a hearing. *Burgess v. Mayor & Aldermen of Brockton*, 95.

An assignee of a right of action upon an account for goods sold, who gave no notice of the assignment to the debtor, cannot maintain an action for money had and received against one to whom his assignor, after the assignment to him, for a valid consideration assigned the same right of action and who, in good faith and without knowledge of the first assignment, in his own right as assignee received the amount of the debt from the debtor. *Rabinowitz v. People's National Bank*, 102.

In an action against an insurance company by one of two persons upon a policy of insurance insuring them "as their interest may appear" against loss of an automobile by theft, and containing a condition that failure to give notice of loss within a certain time shall render a claim of loss void, if neither person gives the required notice after the theft of the automobile, neither person has any enforceable right under the policy, and a payment by the company to one of the insured persons of the amount of his loss is a mere gratuity and does not operate as a relinquishment by the company of the right to insist that a failure by the other person to give the required notice was a bar to an action by him upon the policy. *Navickis v. Fireman's Fund Ins. Co.* 256.

NUISANCE.

Evidence in a suit in equity to enjoin the defendant from violating an equitable restriction by maintaining a stable on land adjoining the plaintiff's land, upon which it was held that the plaintiff was not prevented from maintaining the suit by laches, waiver or acquiescence. *O'Keefe v. Sheehan*, 390.

In the above described suit a master to whom the suit was referred found in substance that the evidence upon the question whether the stable was "in the nature of a nuisance" was "not very complete nor very satisfactory," that "it could hardly be otherwise," and that he could not see "how any

one can tell how this will be until a fair trial of the new arrangements is given" and it was held that the negative findings of the master upon the question whether the defendant's use of the premises was a nuisance required that the bill be dismissed without prejudice and without costs. *O'Keefe v. Sheehan*, 390.

OAK BLUFFS.

In a suit in equity by the town of Oak Bluffs against the Cottage City Water Company, organized under St. 1890, c. 151, to enjoin the defendant from charging for water supplied to domestic consumers in the town a rate higher than that stated in the schedule annexed to an agreement between the town and the company, made in 1910, the plaintiff alleged and contended that the agreement provided that the rate stated in its schedules should be maintained by the defendant unchanged for twenty years, and, in determining the case, it was assumed, without so deciding, that the town had authority to enter into a proper contract with the company respecting water rates to be charged for domestic consumption. *Oak Bluffs v. Cottage City Water Co.* 18.

In the suit above described it was held that the rates to be charged to domestic consumers were not fixed by the contract for the entire term of twenty years, and that the company might raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Ibid.*

OFFICER.

In an action where an attachment was made of an automobile stored upon premises of the plaintiff and, without removing the automobile, the officer placed it in the custody of a keeper and at the end of ten days removed it to another part of the plaintiff's premises where it was secured by a chain fastened and locked across the rear wheels, the trial judge as a part of the plaintiff's taxable costs allowed the officer's charges of \$10 for custody and \$60 for keeper and disallowed \$17 claimed for storage and it was held that under St. 1913, c. 611, § 1, a charge of \$10 for custody was permissible and that, the allowance of \$60 for keeper not being a manifest error of law, was not reviewable by this court, it being within the discretion of the judge to allow for a keeper's charge an amount in excess of \$2 a day for ten days. *Hellinell Garages, Inc. v. Feinbern*. 258.

OPTION.

If, in a contract in writing for the sale of a certain quantity of merchandise, the seller is given the option of increasing the quantity of the merchandise to be sold by a certain amount but the contract does not specify a time within which the option shall be exercised, the buyer will not be bound by an exercise of the option which does not occur within a reasonable time. *Chatham Manuf. Co. v. Avery Chemical Co.* 340.

Option (continued).

Where a contract in writing made on January 17, 1918, for the sale of five hundred barrels of pyroligneous acid gave the seller an option to increase the number of barrels to twenty-five hundred barrels, but stated no time within which the option should be exercised and it appeared that the acid was for use in dyeing khaki cloth for the use of the national government in the World War, and this was known to the seller and that the seller's average weekly output was seventy-five barrels, it was held that an exercise of the option by the seller on August 15, 1918, would not be given within a reasonable time. *Chatnam Manuf. Co. v. Avery Chemical Co.* 340.

Letters, following the making of the contract in writing above described, which were held contained no extension of the time within which the seller must exercise the option of increasing the amount of acid to be shipped. *Ibid.*

In the action above described where the plaintiff asked the judge to rule that a letter written by the buyer to the seller on August 8, 1918, asking him to "discontinue shipments of Pyro Acid Water until further notice" and subsequent correspondence extended the time within which he could exercise his option to increase the amount to be delivered to twenty-five hundred barrels, and the judge gave the ruling with the qualification that the extension was for a reasonable time thereafter it was held, without intimating that the letter of August 8 did so extend the times for the exercise of the option, that the plaintiff had no reason for complaining of the giving of the qualified ruling. *Ibid.*

In the same action it was held that a letter written by the plaintiff on August 15, under the circumstances above described, to the defendant which after referring to the cause of delay and the correspondence with the defendant, and to the contract as one for three thousand barrels, stated, "We . . . took the matter up with you about June 1st when you stated we could go on and ship. We therefore naturally concluded that the contract was reinstated and that we would be able to ship the above quantity," was not an exercise of the option given to the plaintiff in the contract. *Ibid.*

An exercise of the option above described in a letter of November 20, 1918, was held not to have been within a reasonable time after August 8. *Ibid.*

OPTOMETRY.

St. 1912, c. 700, regulating the practice of optometry, is a valid exercise of the police power and violates no provision either of the State or of the Federal Constitution. *Commonwealth v. Houdenbrink*, 320.

One, who, without being authorized or registered as a practitioner of medicine under the provisions of R. L. c. 76, § 8, held himself out as a "Doctor of Ophthalmology," printing after those words, following his name on his billheads, the words, "(McCormick Medical College, Chicago)," and "Nervous Systems Measured and Analyzed. Glasses Fitted for Eye Defects," and who first examined eyes through an instrument called the ophthalmoscope, next placed a try-frame on the nose of the patient in which were inserted successively various lenses, and then fitted glasses for the patient, may be found to be holding himself out as a practitioner of medicine contrary to the provisions of the statute. *Ibid.*

OUSTER.

Sole and uninterrupted possession of land, owned in common, by one of the tenants in common with appropriation by him of the profits with the knowledge of the others, if continued for a long series of years, unexplained and uncontrolled by any evidence tending to show a reason for the failure of the other tenants in common to assert rights, furnishes evidence upon which an inference of an actual ouster and adverse possession may and ought to be drawn. *Nickerson v. Nickerson*, 348.

PARENT AND CHILD.

BASTARDY, see that title.

PARTNERSHIP.

Subsidiary facts found by a master, who heard a suit in equity in which it was necessary to determine the nature of a business relationship between a certain man and the proprietor of a laundry, which were held were not incompatible with the main finding that the man was not a partner in the business. *Glover v. Waltham Laundry Co.* 330.

PASSENGER.

Action for damages and for personal injuries suffered by a passenger, see appropriate subtitle under NEGLIGENCE, *Elevated Railway*.

PAYMENT.

A post-dated check, given by a merchant to the seller of certain goods, with a statement of a further balance due, in order to gain possession of the goods, which were being held by a carrier under orders of the seller until a sight draft for the purchase price was paid, is not as a matter of law a payment, and, upon the check not being paid, the seller may bring an action for the price of the goods sold and need not sue upon the check as a promissory note. *Bergman v. Granstein*, 378.

PERPETUITIES, RULE AGAINST.

Provisions in a will made by a woman, who in contemplation of marriage previously had executed a declaration of trust providing that, if she survived her husband, the trustee should hold the property for the use of her children in such manner as she by deed, instrument in writing or will "should direct or appoint" upon which in a bill in equity by the trustee under the declaration of trust for instructions it was held that the appointment to the first three children of the donor and to the children, living at the death of the donor, of any one of them who had died before the donor, since it provided for a vesting of their interests within twenty-one years after a life in being at the

Perpetuities, Rule against (*continued*).

time of the creation of the power, was not a violation of the rule against perpetuities and was valid. *Greenough v. Osgood*, 235.

In the same suit it was held that the limitation in remainder to such children of the fourth child of the donor as should be living at the death of such fourth child, since it provided for a vesting of such interests which might occur more than twenty-one years after a life in being at the time of the creation of the power, was a violation of the rule against perpetuities and was void. *Ibid.*

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department to be called the "Pratt School of Naval Architecture and Marine Engineering" which was held constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust. *Massachusetts Institute of Technology v. Attorney General*, 288.

PHYSICIANS AND SURGEONS.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. *Vaughan v. Mansfield*, 147.

At the trial above described, the defendant asked for, and the judge refused to give, a ruling that "the husband is not liable for necessities furnished to the wife unless they were either furnished with his knowledge and consent that he be responsible for them, or unless he neglects and refuses to furnish them himself," and it was held that the refusal to give the ruling was right. *Ibid.*

In the same action it also was held that a ruling asked for by the defendant that if "the husband furnishes the wife with sufficient means or money to provide her with what is reasonably necessary for her support and comfort, then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts" properly was refused. *Ibid.*

It was held in the same action that a ruling asked for by the defendant that the "burden of proof is on the plaintiff to show that the defendant neglected or refused to provide his wife with the necessities before the plaintiff can recover" properly was refused. *Ibid.*

One, who, without being authorized or registered as a practitioner of medicine under the provisions of R. L. c. 76, § 8, held himself out as a "Doctor of Ophthalmology," printing after those words, following his name on his bill-heads, the words, "(McCormick Medical College, Chicago)," and "Nervous Systems Measured and Analyzed. Glasses Fitted for Eye Defects," and who first examined eyes through an instrument called the ophthalmoscope, next placed a try-frame on the nose of the patient in which were inserted successively various lenses, and then fitted glasses for the patient, may be found to be holding himself out as a practitioner of medicine contrary to the provisions of the statute. *Commonwealth v. Houtenbrink*, 320.

PLEADING, CIVIL.

Abatement.

See appropriate subtitle under PRACTICE, CIVIL.

Declaration.

Allegations in a declaration in an action of contract by an inventor against a manufacturing corporation for the purchase price of certain letters patent upon which it was held on demurrer to the declaration that the declaration set out no cause of action. *Beaudry v. Hamel Shoe Machinery Co.* 503.

Allegations in a declaration in an action of tort by one employed as ship's cook and seaman against the owner of the ship which plainly describe a maritime tort and set out a cause of action entitling the plaintiff to "indemnity" for his injuries. Following *The Osceola*, 189 U. S. 158, 175. *Proctor v. Dillon*, 538.

Amendment.

See appropriate subtitle under PRACTICE, CIVIL.

PLEADING, CRIMINAL.

Complaint or Indictment.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Lebowitch, petitioner*, 357.

The soundness of an indictment is admitted by a general plea. *Ibid.*

The Superior Court has jurisdiction under St. 1913, c. 563, § 1, to proceed by indictment against one who gets a woman with child, not being her husband. *Commonwealth v. Mekelburg*, 383.

Where an indictment for murder was in two counts, each count charging the murder of a different individual and upon motion of the defendant after arraignment and before trial that the district attorney be required to elect on which count the government would go to trial, it appeared that the facts, circumstances and testimony were relevant to prove that both murders were committed by the defendant at substantially the same time with a design and purpose to destroy evidence of the defendant's commission of the crime of larceny at that time, it was held that the defendant had no just complaint because of the denial of his motion. *Commonwealth v. Szczepanek*, 411.

Allegations in a complaint, that the defendants "did unlawfully, riotously and tumultuously assemble with thirty or more persons, and while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life,

Pleading, Criminal (*continued*).

to wit, a knife, did . . . wound . . . a police officer of said city of Boston, lawfully engaged in dispersing and suppressing said unlawful assembly," fully and sufficiently charge the defendants with the common law offence of a riot. *Commonwealth v. Frishman*, 449.

The allegation of assault in the complaint above described is merely incidental to and a part of the charge of riot, but is not an essential part of that offence. *Ibid.*

Evidence at the trial of an indictment which charged that the defendant, a man, "did assault and beat" the complaining witness, a woman, "with intent to rob her and thereby did rob and steal from the person of said" witness certain described articles of jewelry which was held sufficient to support the indictment. *Commonwealth v. Homer*, 526.

Plea and Motions.

The soundness of an indictment is admitted by a general plea. *Lebowitch, petitioner*, 357.

An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge made against the defendant, comes too late if it is raised for the first time in the form of an offer of proof during the cross-examination of a witness for the Commonwealth at the trial following a general plea of "not guilty" to the indictment, and again is raised by a plea to the jurisdiction of the court filed nearly nine months after conviction. *Commonwealth v. Barronian*, 364.

POOR DEBTOR.

Circumstances under which it was held in an action of contract upon a recognizance given in a poor debtor proceeding that the order refusing the oath to the debtor was not a "final order." *Sallinger v. Hughes*, 104.

Circumstances under which in the same action it was held that the magistrate had power to reconsider his first decision and to correct an error of law. *Ibid.*

In the action above described it also was held that the magistrate committed no error in directing the clerk to remove from the execution the certificate of arrest and in ordering the debtor's discharge. *Ibid.*

In the same action it was held that there was no breach of the recognizance. *Ibid.*

POWER.

A power of appointment of property, real or personal, in favor of a child is well exercised by an appointment to a trustee in favor of the child. *Greenough v. Osgood*, 235.

Provisions in a will made by a woman, who in contemplation of marriage previously had executed a declaration of trust providing that, if she survived her husband, the trustee should hold the property for the use of her children in such manner as she by deed, instrument in writing or will "should direct or appoint" upon which in a bill in equity by the trustee under the declaration of trust for instructions it was held that the power of

- appointment, reserved by the donor to herself in the declaration of trust, was well exercised by her will. *Greenough v. Osgood*, 235.
- In the same suit it was held that the appointment to the first three children of the donor and to the children, living at the death of the donor, of any one of them who had died before the donor, since it provided for a vesting of their interests within twenty-one years after a life in being at the time of the creation of the power, was not a violation of the rule against perpetuities and was valid. *Ibid*.
- In the same suit it also was held that the limitation in remainder to such children of the fourth child of the donor as should be living at the death of such fourth child, since it provided for a vesting of such interests which might occur more than twenty-one years after a life in being at the time of the creation of the power, was a violation of the rule against perpetuities and was void. *Ibid*.
- A devise which was held a due execution of a power conferred upon the testator of disposing of certain property by will. *Old Colony Trust Co. v. Sargent*, 298.

PRACTICE, CIVIL.

Prematurity of Action.

- Where by the terms of a written contract dated October 10, 1916, for the cultivation of land in Florida the plaintiff agreed that the contract should not terminate before January 31, 1919, if so desired by the defendant and the defendant might terminate it at any time after May 31, 1918, an action brought on August 8, 1917, was held prematurely brought. *Potter v. Starratt*, 325.

Abatement.

- A finding of fact made by a judge of the Superior Court in an order sustaining an answer in abatement is not subject to review upon an appeal by the plaintiff from a judgment for the defendant entered in accordance with such order. *Norton v. Musterole Co. Inc.* 587.
- Upon an appeal, under R. L. c. 173, § 96, as amended by Sts. 1906, c. 342; 1910, c. 555, § 4, from a judgment entered upon a motion by the plaintiff (the defendant not moving) after the sustaining of an answer in abatement of a writ, the record properly before this court consists only of the writ, the declaration, the answer in abatement, the motion for judgment, the order allowing the motion and the appeal, and does not include a memorandum of facts found by the judge or copies of affidavits and of documentary evidence submitted to the judge at the hearing upon the answer in abatement. *Ibid*.

Parties.

- In an action of tort for personal injuries suffered by a person under guardianship as an insane person, brought in the name of the guardian, it was said that the action should have been brought in the name of the insane person by her next friend, and not in the name of the guardian; but, no objection having been raised by the defendant, this court treated the action as duly brought in the name of the insane person by her guardian. *Healy v. Boston Elevated Railway*, 150.

Practice, Civil (*continued*).

Where, in an action of contract begun by trustee process against two non-residents as copartners, it appeared that the defendants were not served personally with process but that property in this State had been attached by the trustee process as the property of the defendants, and that a bond had been given by them under R. L. c. 167, § 116, as amended by Sts. 1905, c. 110; 1906, c. 187, to release the attachment, the giving of the bond operated as a general appearance by the defendants, and the action should not be dismissed although no service was made upon them. *Britton v. Goodman*, 471.

In an action of contract against two non-resident individuals as copartners, who appeared generally, the allowance of an amendment joining a third copartner as a party defendant, who is not served with process and who does not appear, does not affect the plaintiff's right to recover judgment against the defendants who had appeared. *Ibid*.

Amendment

In an action of contract against two non-resident individuals as copartners, who appeared generally, the allowance of an amendment joining a third copartner as a party defendant, who is not served with process and who does not appear, does not affect the plaintiff's right to recover judgment against the defendants who had appeared. *Britton v. Goodman*, 471.

Allegations in a motion to amend a declaration in an action of contract by an inventor against a manufacturing corporation for the purchase price of certain letters patent upon which it was held that the motion to amend included new matter which set forth a cause of action, and that the motion should be allowed. *Beaudry v. Hamel Shoe Machinery Co.* 503.

Discontinuance.

The plaintiff, in an action of contract in which no declaration in set-off has been filed and which has not been referred to an auditor, has a right to discontinue his action at any time before trial. *Marsch v. Southern New England Railroad*, 304.

It seems that, since the enactment of St. 1914, c. 576, § 1, the opening of an action for a trial upon the merits before an auditor, or before a judge where no jury has been claimed, or before a jury fixes the time after which the plaintiff cannot discontinue his action as a matter of right. *Ibid*.

Where to an amended declaration in an action of contract containing two counts, the first being upon a contract in writing and the second upon an account annexed for labor and materials performed and furnished under the contract in writing, the defendant filed a general answer to the second count and a motion to strike out certain portions of the first count and the motion having been allowed and the case reported to this court under R. L. c. 173, § 105, this court, treating the motion as a special demurrer to the first count, allowed it and thereafter, without notice to the defendant and without leave of court, the plaintiff discontinued his action, it was held that he had a right so to discontinue at that time. *Ibid*.

Rules of Court.

Rule 45 (1915) of the Superior Court. *Commonwealth v. Hassan*, 26, 30.

Conduct of Trial.

Determination of questions preliminary to admission of evidence.

Where at the trial of issues relating to whether a will was executed by a testator of sound mind or was procured to be executed by undue influence an exception was taken by the appellant to the exclusion of evidence which was offered by him of a declaration by a deceased person of a statement made to him by the testator, which declaration would have been admissible in evidence under R. L. c. 175, § 66, if the judge had found that it was made in good faith and upon the personal knowledge of the declarant, it was held that, because the judge did not find that the statement of the deceased person was made in good faith, and his action could not be said to be unjustifiable, the exception must be overruled. *Bodfish v. Cross*, 428.

Discretionary control of order of proof.

The order of the admission of evidence is within the discretion of the trial judge. *Mason v. Jacot*, 521.

Discretionary power of trial judge as to expert testimony.

It is within the discretionary power of a trial judge to exclude a hypothetical question asked of an expert witness if in the question facts are assumed which are not yet in evidence. *Earle v. New York Central & Hudson River Railroad*, 61.

Requests, rulings and instructions.

If from a bill of exceptions it appears that a judge in his charge did not give in terms a ruling requested by the excepting party, which was a correct statement of the law and was applicable to the circumstances of the case on trial, and that the party asking for the ruling neither excepted to the failure to give the ruling in terms nor called the judge's attention to contentions of his that the principle of law stated in the ruling was not sufficiently clear by the charge and that the ruling should have been given, the record shows no ground for this court to consider such contentions. *Hall v. Commonwealth*, 1.

Where, at the trial of an action by a physician upon an account annexed for services rendered to the defendant, to his wife and to their child, there was evidence tending to show that some of the services were rendered at the request of the defendant, that some were rendered at the request of the defendant's wife, and that the wife was authorized by the defendant to arrange with the plaintiff for his services, it is proper to refuse to rule that the plaintiff could not recover. *Vaughan v. Mansfield*, 147.

At the trial above described, the defendant asked for, and the judge refused to give, a ruling that "the husband is not liable for necessities furnished to the wife unless they were either furnished with his knowledge and consent that he be responsible for them, or unless he neglects and refuses to furnish them himself," and it was held that the refusal to give the ruling was right. *Ibid.*

In the same action it also was held that a ruling asked for by the defendant that if "the husband furnishes the wife with sufficient means or money to provide her with what is reasonably necessary for her support and comfort, then he is not liable for any debts she contracts for necessities unless he gives his consent to such debts" properly was refused. *Ibid.*

Practice, Civil (*continued*).

It was held in the same action that a ruling asked for by the defendant that the "burden of proof is on the plaintiff to show that the defendant neglected or refused to provide his wife with the necessities before the plaintiff can recover" properly was refused. *Vaughan v. Mansfield*, 147.

Evidence at the trial of an action for personal injuries received when the plaintiff, a woman, was crossing a highway in a city and was run into by a motor car operated by the defendant, upon which it was held that a ruling asked for by the defendant, "If the jury find that the plaintiff saw the defendant's car coming, heard his horn, and stood still in the middle of the street for an instant, long enough to see the approaching car, and then started to run across the street in front of the defendant's car, then the plaintiff was not in the exercise of due care and the jury must find for the defendant," properly was refused, both because it disregarded the effect of fright upon the plaintiff and the necessity of instant action in imminent peril; and also because it singled out and emphasized a part only of the controverted evidence and asked for a ruling as to its effect. *Newfsey v. Szemeta*, 160.

In an action upon a promissory note given by two of the three directors of a Massachusetts corporation to the third director as part of an agreement made upon the third director severing his active connection with the corporation it was held that requests for rulings based on the assumption that the plaintiff had a contract with the corporation for continuous employment properly were refused. *Moss v. Copelof*, 162.

An exception to a refusal, by a judge presiding at a trial by jury, to grant a request for a ruling must be overruled if the ruling was given in substance in the charge to the jury. *Coyne v. Maniatty*, 181.

A request for a ruling which assumes as true facts that are in controversy properly may be refused. *Ibid.*

A refusal to grant a request, to give to a jury in terms a ruling which is a correct statement of law pertinent to the issues on trial, is not reversible error where the judge in his charge gives full and correct instructions to the jury on the subject matter of the ruling. *Ibid.*

A request for a ruling in an action against the owner of a motor vehicle for personal injuries received by the plaintiff when run into by the vehicle, while he was crossing a highway, which singled out and emphasized only a part of the salient features of the evidence was held properly refused. *Quinlan v. Hugh Nawn Contracting Co.* 190.

Where in an action by a building contractor upon a contract in writing for the construction of a building for the defendant which was heard by a judge without a jury upon an auditor's report and evidence both oral and documentary the judge refused to grant rulings, asked for by the defendant, that on all the evidence he should find for the defendant, that there was no evidence of any waiver of the contract by either party, and that the plaintiff, having failed to furnish an architect's certificate that the contract had been completed, could not recover, exceptions by the defendant which do not include a report of all the evidence must be overruled. *James Elgar, Inc. v. Newhall*, 373.

Where at the hearing of the action above described, the defendant contended that certain mahogany furnished by the plaintiff did not satisfy the requirements of samples furnished by the plaintiff, and the judge so found;

but he also found that the defects in the mahogany were remedied to the satisfaction of the defendant, and refused to grant a request by the defendant for a ruling that, because the mahogany was not in accordance with the sample, the plaintiff could not recover, and the defendant alleged exceptions, it was held that, in the absence of a report of all the evidence, the exceptions must be overruled. *James Elgar, Inc. v. Newhall*, 373.

Where at the hearing of the action above described, the defendant asked for a ruling that, the plaintiff having admitted that he did not furnish material according to sample, the burden was on him to show that the defendant had not been damaged, and the judge stated that he adopted the ruling requested in the sense that the burden was on the plaintiff to show that he substantially completed the contract it was held that the manner in which the request was dealt with was correct. *Ibid.*

Where at the hearing of the action above described, it appeared that there was a delay in the completion of the contract beyond the time permitted by its provisions, and the judge found that it did not appear that the delay was due to any failure on the plaintiff's part to figure the size and "determination" of material from the plan and specifications, and refused to give a ruling, asked for by the defendant, that the defendant was "not liable for any delays occasioned by the plaintiff in its factory, as the size and determination of all material could have been figured from the plan and specifications" it was held that the refusal of the ruling was proper. *Ibid.*

A judge hearing an action without a jury is not required to grant a request for a finding of fact. *Ibid.*

Evidence at the hearing of the case above described, upon which the judge found that the provision of the contract relating to the presentation by the plaintiff to the architect of a claim for an extension of time was waived by the parties, and that the defendant did not so furnish all labor and materials essential to the conduct of the plaintiff's work as not to delay its progress, and assessed damages therefor and upon which it was held that an exception to the refusal to rule as requested that, "The contract being silent as to the length of time in which the work covered by the contract was to be completed, the plaintiff cannot recover damages on account of delay caused by other contractors" must be overruled. *Ibid.*

No error appears in the denial of requests for rulings where there is nothing stated in the record showing what, if anything, the subject matter of the requests have to do with the issues involved in the trial, or showing or tending to show their pertinency, or that the party making them was injured by their refusal. *Levine v. Cohen*, 446.

A request for a ruling based upon an assumption of fact contrary to the finding of the trial judge is properly denied. *Ibid.*

Where at the trial of an action against a railroad corporation for personal injuries caused by a collision between a motor car driven by the plaintiff and a locomotive of the defendant at a grade crossing of the railroad with a highway, a request by the plaintiff that the jury be instructed that, "if the defendant's servants neglected to give the signals required by statute to be given at the railroad crossing, the jury might infer that this neglect contributed to the said injuries" was refused, and the jury were instructed that, if they found that the statutory signals were not given, that fact was evidence of negligence, and, if that negligence contributed to the injury, the

plaintiff had proved his case so far as the defendant's negligence was concerned it was held, that there was no error in the refusal to instruct the jury as requested nor in the instruction given. *Lydon v. New York, New Haven, & Hartford Railroad*, 469.

Evidence at the trial of an action by a guest in a motor car approaching a grade crossing of a railroad with a highway, to recover for injuries sustained by him in jumping from the motor car to avoid a collision with an approaching train upon which it was held that rulings asked for by the defendant in substance that, if the jury found that the driver of the motor car was reckless, such negligence should be imputed to the plaintiff properly were refused, because it could not be said as a matter of law that the plaintiff entrusted himself wholly to the care of his host. *Fahy v. Director General of Railroads*, 510.

Evidence in the action above described upon which it was held that it could not be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence. *Ibid.*

It not being denied, in the action above described, that the plaintiff was a guest of the driver of the motor car, a request for a ruling that he and the driver were engaged in a joint enterprise and therefore that he was bound by the driver's neglect, properly was refused. *Ibid.*

Judge's charge.

The use, by a judge in his charge at the trial of a petition for damages resulting from a taking of land for the construction of a State highway, of the word "all," modifying the word "estates" in some passages in a long charge defining what were benefits resulting to estates generally in the neighborhood from the construction of the highway, when the charge was read as a whole was held to have been sufficiently accurate. *Hall v. Commonwealth*, 1.

Where at the argument in this court of a bill of exceptions saved by the plaintiff in an action for personal injuries caused by slipping on ice alleged to have accumulated by reason of the defendant's negligence the plaintiff waived exceptions to refusals to instruct the jury as requested by him and relied upon an alleged erroneous instruction, the alleged error in which was not called to the attention of the trial judge at the close of the charge, it was stated that it was doubtful whether any exception was open to the plaintiff under the circumstances. *Chestnut v. Sawyer*, 46.

Instructions bearing upon the liability of the lessee in the action above described, which were held not open to objection, no substantial error in the charge resulting in a mistrial being shown. *Ibid.*

Where a judge, who at a trial, subject to an exception by the plaintiff, erroneously had permitted the defendant, in order to impeach testimony of his own witness to introduce certain evidence, charged the jury in substance that, if they believed the evidence offered in impeachment, then they "just put the testimony of the first witness out of the case. You do not put in the second witness's testimony as affirmative facts or having any probative force." It was held, that the rights of the plaintiff were protected, and that his exception must be overruled. *Bloustein v. Shindler*, 440.

Where at the trial of an action against a railroad corporation for personal injuries caused by a collision between a motor car driven by the plaintiff and a

locomotive of the defendant at a grade crossing of the railroad with a highway, a request by the plaintiff that the jury be instructed that, "if the defendant's servants neglected to give the signals required by statute to be given at the railroad crossing, the jury might infer that this neglect contributed to the said injuries" was refused, and the jury were instructed that, if they found that the statutory signals were not given, that fact was evidence of negligence, and, if that negligence contributed to the injury, the plaintiff had proved his case so far as the defendant's negligence was concerned it was held, that there was no error in the refusal to instruct the jury as requested nor in the instruction given. *Lydon v. New York, New Haven, & Hartford Railroad*, 469.

Estoppel arising from Position taken by Counsel at Trial.

Where at the trial of an action upon a promissory note given as part consideration by the purchaser to the seller of certain brick under a formal bill of sale which contained a warranty of title but no warranty or representation as to quality a colloquy occurred between the counsel for the defendant and the judge, and the judge ordered a verdict for the plaintiff and in this court the defendant "waived all the defences set up in the answer except that of misrepresentation as to the quality of the bricks sold, and that the consideration, if there was any, failed" it was held that the judge must have understood from the statements of the defendant's counsel that he did not rely on the alleged misrepresentation; and therefore that, the defence of breach of warranty not being open under the contract, the ordering of the verdict was right. *Bennett v. Thomson*, 463.

Finding by Judge.

Evidence in the report of an auditor, to whom was referred an action of contract for an alleged breach by the defendant of an agreement to sell and deliver to the plaintiff two thousand barrels of cocoa powder by lot shipments upon which it was held that a judge of the Superior Court, who heard the case upon the auditor's report as the only evidence was warranted in finding that the contract between the parties was not wholly embodied in the letter of confirmation of the plaintiff's order. *Samuels v. W. H. Miner Chocolate Co.* 312.

Evidence in the same action upon which it was held that the judge was warranted in finding that the plaintiff had broken the contract, that the breach went to its essence, that the cancellation by the defendant was warranted; and in finding for the defendant. *Ibid.*

A judge hearing an action without a jury is not required to grant a request for a finding of fact. *James Elgar, Inc. v. Newhall*, 373.

A judge in denying a motion for a new trial of an action at law need not make any findings of fact. *Davis v. Boston Elevated Railway*, 482.

A determination of facts by a judge upon a motion for a new trial made by the defendant in an action against a street railway company for personal injuries resulting from a foreign substance entering the plaintiff's eye coincidentally with an explosion upon or under a street car of the defendant on the ground of newly discovered evidence was held not subject to revision, and his denial of the motion was proper. *Ibid.*

Certain findings which were made without supporting evidence by the judge in denying a motion for a new trial in the circumstances above described, but which were held did not affect nor vitiate the judge's main decision, that he could not place reliance upon the testimony which was relied on by the defendant to identify the photographic plates as pictures of the plaintiff's eye, and that the record showed no abuse of judicial discretion. *Davis v. Boston Elevated Railway*, 482.

It is not error for a judge, who, upon the denial of a motion for a new trial, filed a statement of facts upon which he relied in so doing, to withdraw such statement from the files and two months later to restore it, after, upon a rehearing of the motion, he has affirmed his former action. *Ibid*.

Ordering of Verdict.

A denial of a motion to order a verdict for the defendant in an action for breach of a contract in writing to employ the plaintiff as general manager of a store, which it was held was right. *Hanneman v. Shliesek & Sons, Inc.* 317.

Where the evidence at a trial does not warrant a verdict for the plaintiff, the trial judge, after the return of a verdict for the plaintiff but before it has been affirmed and recorded, may order a verdict entered and recorded for the defendant. *Flaherty v. Boston Elevated Railway*, 422.

Where at the trial of an action upon a promissory note given as part consideration by the purchaser to the seller of certain brick under a formal bill of sale which contained a warranty of title but no warranty or representation as to quality a colloquy occurred between the counsel for the defendant and the judge as to whether the defendant claimed a misrepresentation of the quality of the bricks and the judge ordered a verdict for the plaintiff and in this court the defendant "waived all the defences set up in the answer except that of misrepresentation as to the quality of the bricks sold, and that the consideration, if there was any, failed," it was held that the judge must have understood from the statements of the defendant's counsel that he did not rely on the alleged misrepresentation; and therefore that, the defence of breach of warranty not being open under the contract, the ordering of the verdict was right. *Bennett v. Thomson*, 463.

If a motion by the defendant, at the close of all the evidence at the trial of an action at law, that a verdict be ordered in his favor is denied by the judge without asking the defendant to point out more particularly the propositions of law upon which he relies, and the defendant alleges an exception, it is open to the defendant in this court to raise any question of law actually involved. *Proctor v. Dillon*, 538.

Special Question to Jury.

At the trial of a petition for the assessment of damages resulting from the taking of a portion of a farm of the petitioner for the construction of a State highway, where the judge submitted five special questions to the jury in an endeavor to determine the damage to the petitioner, the special benefit which resulted to him from the construction of the highway and the benefit which resulted to him in common with others generally in the neighborhood, one of such questions, which was as follows: "Did the build-

ing and maintenance of the road confer upon the estates in the neighborhood generally a benefit or benefits of a sort common to them all?" was appropriately expressed and the use of the word "all" was not erroneous. *Hall v. Commonwealth*, 1.

The submission of special questions to a jury at the trial of an action of contract is wholly within the discretion of the trial judge. *Hanneman v. Shlivek & Sons, Inc.* 317.

Order of Judgment on Auditor's Report.

In an action against a stockbroker by a customer for money had and received which was referred to an auditor, judgment was ordered for the defendant and it was held that a finding by the auditor for the defendant imported a finding of all subsidiary facts essential to that conclusion. *Bendslev v. Lovell*, 133.

New Trial.

In an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate where the jury found for the plaintiff and, when the verdict was recorded and before the jury were dismissed, the judge under St. 1915, c. 185, reserved leave with the jury's assent to enter a verdict for the defendant if it later should be decided by the Superior Court or by this court that a verdict for the plaintiff ought not to have been entered, and later, subject to an exception by the plaintiff, allowed a motion that a verdict be entered for the defendant, this court, having determined that the allowance of that motion was error, also held that a contention of the plaintiff that a new trial must be granted could not be supported, and, under St. 1913, c. 716, § 2, ordered that the original verdict for the plaintiff should stand. *Kaminski v. Fournier*, 51.

A judge in denying a motion for a new trial of an action at law need not make any findings of fact. *Davis v. Boston Elevated Railway*, 482.

Upon exceptions in an action at law, where it appeared that, in denying a motion for a new trial, the judge had filed a paper entitled a "Memorandum of Decision," it was stated that the paper was called so improperly. *Ibid.*

While a paper, entitled a "Memorandum of Decision," filed by a judge accompanying an order denying a motion for a new trial of an action at law, ordinarily would form no part of the record upon exceptions taken to the order, where the paper expressly was made a part of the bill of exceptions, its contents were held to be before this court in every material aspect. *Ibid.* Statement, by RUGG, C. J., of the controlling principles of law respecting the granting of motions for new trials on the ground of newly discovered evidence. *Ibid.*

The determination of a motion for a new trial of an action at law on the ground of newly discovered evidence rests within the sound judicial discretion of the trial judge. *Ibid.*

Upon a motion for a new trial made by the defendant in an action against a street railway company for personal injuries resulting from a foreign substance entering the plaintiff's eye coincidentally with an explosion upon or under a street car of the defendant on the ground of newly discovered evidence it was held that the determination of certain facts by the judge was

Practice, Civil (*continued*).

not subject to revision, and that his denial of the motion was proper. *Davis v. Boston Elevated Railway*, 482.

Certain findings which were made without supporting evidence by the judge in denying the motion for a new trial in the circumstances above described, but which were held did not affect nor vitiate the judge's main decision, that he could not place reliance upon the testimony which was relied on by the defendant to identify the photographic plates as pictures of the plaintiff's eye, and that the record showed no abuse of judicial discretion. *Ibid.*

Evidence in the action above described which the judge found that the defendant failed in the exercise of due diligence to discover and upon which it was held that the finding was not without support. *Ibid.*

It is not error for a judge, who, upon the denial of a motion for a new trial, filed a statement of facts upon which he relied in so doing, to withdraw such statement from the files and two months later to restore it, after, upon a rehearing of the motion, he has affirmed his former action. *Ibid.*

Vacation of Judgment.

Circumstances under which it was held that an order denying a motion made by a defendant to vacate a judgment entered for him must be affirmed. *Marsch v. Southern New England Railroad*, 304.

Memorandum.

While a paper, entitled a "Memorandum of Decision," filed by a judge accompanying an order denying a motion for a new trial of an action at law, ordinarily would form no part of the record upon exceptions taken to the order, where the paper expressly was made a part of the bill of exceptions, its contents were held to be before this court in every material aspect. *Davis v. Boston Elevated Railway*, 482.

Exceptions.

Bill.

While a paper, entitled a "Memorandum of Decision," filed by a judge accompanying an order denying a motion for a new trial of an action at law, ordinarily would form no part of the record upon exceptions taken to the order, where the paper expressly was made a part of the bill of exceptions, its contents were held to be before this court in every material aspect. *Davis v. Boston Elevated Railway*, 482.

When exception lies.

If from a bill of exceptions it appears that a judge in his charge did not give in terms a ruling requested by the excepting party, which was a correct statement of the law and was applicable to the circumstances of the case on trial, and that the party asking for the ruling neither excepted to the failure to give the ruling in terms nor called the judge's attention to contentions of his that the principle of law stated in the ruling was not made sufficiently clear by the charge and that the ruling should have been given, the record shows no ground for this court to consider such contentions. *Hall v. Commonwealth*, 1.

Where at the argument in this court of a bill of exceptions saved by the plaintiff in an action for personal injuries caused by slipping on ice alleged to have accumulated by reason of the defendant's negligence the plaintiff waived exceptions to refusals to instruct the jury as requested by him and relied upon an alleged erroneous instruction, the alleged error of which was not called to the attention of the trial judge at the close of the charge, it was stated that it was doubtful whether any exception was open to the plaintiff under the circumstances. *Chestnut v. Sawyer*, 46.

A ruling asked for by the defendant at the trial of an action for personal injuries received when the plaintiff, a woman, was crossing a highway in a city and was run into by a motor car operated by the defendant which it was held properly was refused, both because it disregarded the effect of fright upon the plaintiff and the necessity of instant action in imminent peril; and also because it singled out and emphasized a part only of the controverted evidence and asked for a ruling as to its effect. *Neafsey v. Szemeta*, 160.

A request for a ruling which assumes as true facts that are in controversy properly may be refused. *Coyne v. Maniatty*, 181.

Where at the trial of an action by a woman for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate upon a sidewalk by a broken spout on a house of the defendant, the associate counsel in his deposition was asked, "Have you noticed the situation as to the conductor since" the time when the photographs were taken, and the defendant objected to the question and the deponent answered, "It looks like a new conductor" the answer was admitted in evidence and the defendant saved an exception but did not move to have the answer stricken out, it was held that the question was a proper one; that, although the answer was not responsive and presumably must have been stricken out if the defendant had so requested, his failing so to request waived any objection he might have to the answer, and therefore that the exception must be overruled. *Burke v. Kellough*, 405.

At the trial of an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets where there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent and it was held that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

Whether error was harmful.

Exceptions by the defendant to the exclusion of a hypothetical question asked by him in cross-examination of an expert medical witness called by the plaintiff at the trial of an action of tort based upon an assumption of facts of which no evidence yet had been introduced, must be overruled, where it appears that in redirect and in recross-examination there was extensive

inquiry on the same subject matter and the defendant was permitted to ask questions which in substance sought the same information as that which previously had been excluded in cross-examination, both because it was a proper exercise of discretion to exclude hypothetical questions based on facts of which there was not as yet any evidence, and because, owing to the redirect and recross-examination, the defendant was not harmed by the exclusion. *Earle v. New York Central & Hudson River Railroad*, 61.

An exception to a refusal, by a judge presiding at a trial by jury, to grant a request for a ruling must be overruled if the ruling was given in substance in the charge to the jury. *Coyne v. Maniatty*, 181.

A refusal to grant a request, to give to a jury in terms a ruling which is a correct statement of law pertinent to the issues on trial, is not reversible error where the judge in his charge gives full and correct instructions to the jury on the subject matter of the ruling. *Ibid.*

Where a judge, who at a trial, subject to an exception by the plaintiff, erroneously had permitted the defendant, in order to impeach testimony of his own witness, to introduce certain evidence, charged the jury in substance that, if they believed the evidence offered in impeachment, then they "just put the testimony of the first witness out of the case. You do not put in the second witness's testimony as affirmative facts or having any probative force" it was held that the rights of the plaintiff were protected, and that his exception must be overruled. *Bloustein v. Shindler*, 440.

Judgment ordered under St. 1913, c. 716, § 2.

In an action by an administrator against the owner and driver of a motor vehicle for causing the death of the plaintiff's intestate where the jury found for the plaintiff and, when the verdict was recorded and before the jury were dismissed, the judge under St. 1915, c. 185, reserved leave with the jury's assent to enter a verdict for the defendant if it later should be decided by the Superior Court or by this court that a verdict for the plaintiff ought not to have been entered, and later, subject to an exception by the plaintiff, allowed a motion that a verdict be entered for the defendant, this court having determined that the allowance of that motion was error, also held that a contention of the plaintiff that a new trial must be granted could not be supported and, under St. 1913, c. 716, § 2, ordered that the original verdict for the plaintiff should stand. *Kaminski v. Fournier*, 51.

Report.

A ruling upon a matter of law by a judge of the Municipal Court of the City of Boston in a writ of review in the Municipal Court of the City of Boston is not subject to report to the Appellate Division. *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114.

Appeal.

No appeal lies from a denial by the Appellate Division of the Municipal Court of the City of Boston of a petition to establish the truth of a report, which, upon its presentation for allowance to the trial judge of the court, had been disallowed by him. *Jackson Caldwell Co. v. Poto*, 58.

The right of appeal to the Superior Court from a judgment entered in the Municipal Court of the City of Boston in an action which was brought there by compulsion of law and not by election was not affected by the provisions of St. 1912, c. 649, § 2, as amended by St. 1914, c. 35, § 2; c. 409. *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114.

The jurisdiction of the Appellate Division of the Municipal Court of the City of Boston, conferred by St. 1912, c. 649, § 8, as amended by St. 1914, c. 35, § 3, extends only to actions in which there is no right of appeal to the Superior Court. *Ibid*.

Upon an appeal, under R. L. c. 173, § 96, as amended by Sts. 1906, c. 342; 1910, c. 555, § 4, from a judgment entered upon a motion by the plaintiff (the defendant not moving) after the sustaining of an answer in abatement of a writ, the record properly before this court consists only of the writ, the declaration, the answer in abatement, the motion for judgment, the order allowing the motion and the appeal, and does not include a memorandum of facts found by the judge or copies of affidavits and of documentary evidence submitted to the judge at the hearing upon the answer in abatement. *Norton v. Musterole Co. Inc.* 587.

A finding of fact made by a judge of the Superior Court in an order sustaining an answer in abatement is not subject to review upon an appeal by the plaintiff from a judgment for the defendant entered in accordance with such order. *Ibid*.

Costs.

In an action where an attachment was made of an automobile stored upon premises of the plaintiff and, without removing the automobile, the officer placed it in the custody of a keeper and at the end of ten days removed it to another part of the plaintiff's premises where it was secured by a chain fastened and locked across the rear wheels, the trial judge as a part of the plaintiff's taxable costs allowed the officer's charges of \$10 for custody and \$60 for keeper and disallowed \$17 claimed for storage and it was held that under St. 1913, c. 611, § 1, a charge of \$10 for custody was permissible and that, the allowance of \$60 for keeper not being a manifest error of law, was not reviewable by this court, it being within the discretion of the judge to allow for a keeper's charge an amount in excess of \$2 a day for ten days. *Helliwell Garages, Inc. v. Feinberg*, 258.

Upon the denial of an abatement of a tax upon income asked for by an executor by a petition under St. 1916, c. 269, § 20, this court, under St. 1909, c. 490, Part I, § 80, (made applicable to the proceeding by St. 1916, c. 269, § 20,) ordered judgment for the tax commissioner for his expenses and costs, to be taxed by the Superior Court. *Wheelwright v. Tax Commissioner*, 584.

Procedure under Workmen's Compensation Act.

See appropriate subtitle under WORKMEN'S COMPENSATION ACT.

Writ of Error.

See that title.

PRACTICE, CRIMINAL.

Grand Jury Proceedings.

Statement by RUGG, C. J., of some instances where the presence before a grand jury, while a witness is testifying, of persons other than the witness is lawful because it is necessary in order that the grand jury may ascertain the truth as to the matter under investigation. *Lebowitch, petitioner*, 357.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Ibid.*

An objection to an indictment on the ground that unauthorized persons were present with the grand jury when they were hearing evidence relating to the charge made against the defendant, comes too late if it presented for the first time after a general plea to the indictment, a trial and a verdict of guilty, by motions for leave to withdraw the plea and to file a plea in abatement and other pleadings adapted to raise the question of the legality of the indictment. *Commonwealth v. Homer*, 526.

Abatement.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Lebowitch, petitioner*, 357.

Election between Counts.

Where an indictment for murder was in two counts, each count charging the murder of a different individual and upon motion of the defendant after arraignment and before trial that the district attorney be required to elect on which count the government would go to trial, it appeared that the facts, circumstances and testimony were relevant to prove that both murders were committed by the defendant at substantially the same time with a design and purpose to destroy evidence of the defendant's commission of the crime of larceny at that time, it was held that the defendant had no just complaint because of the denial of his motion. *Commonwealth v. Saczapanek*, 411.

Trial together of Counts alleging Distinct Offences.

It is not error to place a defendant, charged in two counts of an indictment with distinct attempts to commit larceny from the persons of different

individuals, on trial upon both counts of the indictment at the same time. *Lebowitch, petitioner*, 357.

Rules of Court.

Rule 45 (1915) of the Superior Court. *Commonwealth v. Hassan*, 26, 30.

Conduct of Trial.

Cross-examination by district attorney.

Where without producing any record of bankruptcy a district attorney at the trial of an indictment for robbery was allowed to cross-examine the defendant as to whether he had filed a petition in bankruptcy several years before the robbery, it was stated that such a method of cross-examination was highly prejudicial to the defendant, and that, irrespective of whether the district attorney believed that a petition in bankruptcy had been filed, an unfair advantage was taken of the defendant in putting the questions. *Commonwealth v. Homer*, 526.

Where at the trial above described the district attorney was permitted to ask a witness in cross-examination a series of questions as to whether, on sundry occasions, knowledge had come to her that "the authorities" were making an inquiry as to the defendant "selling dope" and all answers were in the negative, without determining whether the exceptions to the evidence should be sustained, this court stated that the method of cross-examination was highly improper and prejudicial to the defendant, being an attempt by unfair means to belittle him and render him unworthy of respect or credit. *Ibid*.

Argument by district attorney.

If a district attorney, in his closing argument at the trial of an indictment, makes an untrue statement of law, the attention of the judge should be called thereto at once; and an exception to a refusal to grant a request, presented after the close of the argument, for an instruction that the statement was not a true statement of the law, must be overruled. *Commonwealth v. Homer*, 526.

Requests, rulings and instructions.

It is reasonable to require that requests for instructions at a trial for homicide shall be presented before the closing arguments of counsel are begun. *Commonwealth v. Hassan*, 26.

It is not error for a judge presiding at the trial of an indictment for manslaughter to refuse to receive requests by the defendant for instructions to be given to the jury if those requests are filed after the closing argument for the defendant and during the argument for the Commonwealth, where the charge to the jury is full and adequate and covers every issue on trial and no contention was made at its close that it was incomplete upon any issue raised at the trial. *Ibid*.

It is proper for the judge presiding at a trial for manslaughter to refuse to give to the jury an instruction which is not applicable to the evidence at the trial. *Ibid*.

At the trial of an indictment, it is proper to refuse to instruct the jury that "Each juror shall render his own independent judgment and, although

giving due consideration to the opinions of the other jurors, he shall not acquiesce in the same or be unduly influenced thereby." *Commonwealth v. Hassan*, 26.

As the indictment above described was tried, the question which the jury had to decide was, whether the jewels were taken from the owner by force and against her will, the defendant contending that they were delivered to him voluntarily by the owner as security for money which he had left with her and it was held that requests by the defendant at the close of the evidence, for instructions based on assumption that the defendant procured possession of the jewels in an honest belief that he had a right to do so to satisfy a debt due him rightly were refused because there was no evidence to which they were applicable. *Commonwealth v. Homer*, 526.

Instructions which permitted a jury to find that one, who had committed a homicide, was guilty of murder in the first degree because the homicide was committed with extreme atrocity and cruelty are warranted where there was evidence tending to show that the defendant either alone or assisted by others committed the homicide by stabbing and cutting the deceased in twenty places and by shooting him in the head three times. *Commonwealth v. Feci*, 562.

A request, made for the first time at the close of the charge to the jury at the trial of an indictment for murder, for an instruction based on facts of which there was no evidence at the trial, properly may be refused. *Ibid.*

Stay of Sentence.

A refusal by a judge of the Superior Court to stay execution of a sentence imposed upon a defendant who had been found guilty after the trial of an indictment for crime is not subject to review either upon a petition for a writ of habeas corpus or upon a writ of error. *Lebowitch, petitioner*, 357.

In refusing to grant a motion for a stay of execution under R. L. c. 220, § 3, the judge need not state his reasons. *Ibid.*

Exceptions.

Where, at the trial of an indictment against two defendants jointly charged with manslaughter, each defendant accusing the other of the homicide and there being evidence that cartridges containing bullets such as were found in the body of the decedent were found concealed in a shoe of one defendant while he was in jail the day after the homicide, the attorney for the other defendant in effect argued that no explanation of this fact had been given in the "lower court," the district attorney made no such comment, and the defendant in whose shoe the cartridges were found requested an instruction that his failure to give an explanation in the lower court could not be considered against him, and relied on St. 1912, c. 325, it was held that an exception to the denial of the request must be overruled, because no objection was made at the trial to the argument of the co-defendant and because St. 1912, c. 325, had no application to such argument. *Commonwealth v. Hassan*, 26.

Where, at the trial of an indictment charging that the defendant in January, 1918, falsely testified that he did not own certain real estate, the defendant

testified in his own behalf and, subject to his exception, was compelled to answer in cross-examination questions as to whether he had consulted a certain attorney at law with reference to disposing of his interest in the real estate and whether he had not said to the attorney that he wanted "to get rid of" his interest therein and his answer in substance was that he did not remember, and that he "did not have any interest to say such a thing" it was held that the exceptions must be overruled because under the circumstances the defendant had no valid ground for complaint. *Commonwealth v. Barronian*, 364.

If a district attorney, in his closing argument at the trial of an indictment, makes an untrue statement of law, the attention of the judge should be called thereto at once; and an exception to a refusal to grant a request, presented after the close of the argument, for an instruction that the statement was not a true statement of the law, must be overruled. *Commonwealth v. Homer*, 526.

Evidence given by a witness on redirect examination by the district attorney at the trial of an indictment for robbery which was held within the discretion of the judge to admit. *Ibid.*

Where testimony by affidavit by a former maid of the complaining witness at the trial above described having been admitted to show improper relations of that witness with the defendant, the witness was recalled by the district attorney and was permitted to be asked how the affiant came to leave her employ, and answered, "I discharged her," and the defendant excepted, it was held that, while the evidence properly might have been excluded as the bias which one witness at a criminal trial feels toward another is not a material matter, under the circumstances of the statements in the affidavit, no reversible error was shown. *Ibid.*

Where the bill of exceptions saved by the defendant at the trial of an indictment for murder recited that the trial judge instructed the jury fully as to the law upon the main issues presented, to which no exception was taken and the charge contained no reference to the alleged larceny of brass and the defendant did not make any request that an instruction should be given on that subject, did not call the judge's attention to the omission of the subject from the charge, and saved no exception on the subject, it was held that it was not open to the defendant to contend in this court that the omission of instructions on the subject of the larceny of the brass was error entitling him to a new trial. *Commonwealth v. Feci*, 562.

Instructions which permitted a jury to find that one, who had committed a homicide, was guilty of murder in the first degree because the homicide was committed with extreme atrocity and cruelty are warranted where there was evidence tending to show that the defendant either alone or assisted by others committed the homicide by stabbing and cutting the deceased in twenty places and by shooting him in the head three times. *Ibid.*

A request, made for the first time at the close of the charge to the jury at the trial of an indictment for murder, for an instruction based on facts of which there was no evidence at the trial, properly may be refused. *Ibid.*

PRESCRIPTION.

See ADVERSE POSSESSION.

PROBATE COURT.

Appeal.

A creditor of a deceased person is not a "person who is aggrieved" by a decree of the Probate Court allowing a will of his debtor and is not given by R. L. c. 162, § 9, a right of appeal therefrom. *Monroe v. Cooper*, 33.

Whether under any circumstances a creditor of a deceased person would have a right of appeal from a decree of the Probate Court upon a petition under R. L. c. 137, § 1, cl. 3, giving "one or more of the principal creditors" of a deceased person a right to petition for administration of his estate, was not determined. *Ibid.*

PROXIMATE CAUSE.

At the trial of an action against a street railway company for an injury to a motor vehicle resulting from a collision with a street car on a curve in the street railway track near the intersection of two streets where there was evidence that at the instant of collision the motorman turned on a high power searchlight which dazzled the driver of the motor vehicle, the judge instructed the jury, subject to an exception by the defendant, in substance that they might determine whether the motorman was negligent in thus turning on the searchlight at the time when the collision was imminent, and it was held, that the exception must be sustained, because the turning on of the searchlight at the time of collision could not have caused the collision, and the defendant was prejudiced by the erroneous instruction. *Wright v. Concord, Maynard & Hudson Street Railway*, 456.

Evidence in an action by a guest in a motor car, approaching a grade crossing of a railroad with a highway, to recover for his injuries sustained in jumping from the motor car to avoid a collision with an approaching train, against the Director General of Railroads, who was operating the railroad company, where the jury found specially that the signals required by St. 1906, c. 463, Part II, §§ 147, 148, were not given, which was held warranted a finding that omission to give the signals was negligence of the defendant which contributed to the injury to the plaintiff. *Fahy v. Director General of Railroads*, 510.

Evidence at the trial of an action by a woman against the proprietor of a hotel and restaurant for malicious prosecution, where it appeared that a police officer called by the manager of the hotel caused the arrest of the plaintiff on a charge of drunkenness, and that the plaintiff was acquitted, the charge being groundless, upon which it was held that it could not be said that a finding was not warranted that the agents of the defendant, acting within the scope of their authority, without reasonable cause and upon an improper motive, set in motion the train of causation which naturally and proximately resulted in the arrest and accusation of the plaintiff. *Mason v. Jacot*, 521.

Evidence in a proceeding under the workmen's compensation act upon which it was held that the incapacity of a cigar maker, caused by neuralgic pain, and which the Industrial Accident Board found was induced in rolling cigars, while it properly might be found to have arisen during the course of the employee's employment, could not be found to have arisen from it in such a sense as to entitle him to compensation under the workmen's compensation act. *Pimental's Case*, 598.

PUBLIC WORK.

A staging and falls, used in the work of painting and plastering a public pier and steel shed but not made a part thereof, are not labor performed or furnished or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77. *Bay State Dredging & Contracting Co. v. W. H. Ellis & Son Co.* 263.

A premium upon a policy of insurance against liability, issued to a contractor constructing a public building or work, is not labor or material used in "the construction or repair of public buildings or other public works" within the intendment of R. L. c. 6, § 77. *Ibid.*

In a suit brought by creditors to recover under R. L. c. 6, § 77, for labor performed or furnished and materials used in the construction of a public work consisting of a pier and steel shed for the city of New Bedford, including a driveway on the pier, where it appeared that the work excepting the driveway was completed on a September 4 by the original contractor and the driveway was completed in October by another contractor, it was held that the work referred to in the statute embraced the entire work contracted for when the security was given, whether completed by the original contractor or by another, and that claims filed at any time previous to sixty days after the completion of the driveway were seasonably filed. *Ibid.*

PURCHASE.

If the directors of a business corporation, incorporated under the laws of the State of Maine and having a usual place of business in this Commonwealth, which has outstanding both preferred and common stock, cause to be organized under the laws of the State of Maine another corporation, issuing common stock only, and all of the stockholders, both preferred and common, of the original corporation exchange their shares for shares of stock of the new corporation, after which the original corporation transfers all its property to the new corporation, which continues the business as before; and if an inhabitant of this Commonwealth, who owned shares of the preferred and of the common stock of the original corporation, exchanged them for shares of stock of the new corporation, which were of greater value, such transaction is a sale of the shares in the original, and a purchase of the shares in the new corporation and the gain resulting therefrom is subject to a tax under St. 1916, c. 269, § 5 (c). *Osgood v. Tax Commissioner*, 88.

Circumstances under which it was held that an exchange of shares of stock in one New York corporation, by an inhabitant of Massachusetts, share for share, for shares in another New York corporation, of a much larger capitalization, which was organized to acquire the common stock of four corporations engaged in the manufacturing of products which could be conducted more economically under a single management and issued substantially all of its capital stock for that purpose, was a sale and purchase of intangible personal property under St. 1916, c. 269, § 5 (c), and that the gain resulting therefrom was subject to the income tax imposed by that statute. Following *Osgood v. Tax Commissioner*, *ante*, 88. *Stone v. Tax Commissioner*, 93.

RAILROAD.

A regulation, established by the Boston and Maine Railroad and continued in effect by the Director General of Railroads while in control of that railroad, which required of an express company, doing a local business upon trains of that railroad between Boston and Amesbury and Boston and Newburyport, that all shipments should be forwarded in baggage car service and that an express messenger must accompany each shipment and present for his personal transportation an express ticket, which differed from the ordinary season ticket only in the respect that it might be used by any person acting as messenger, was held to be reasonable and not in violation of the provisions of St. 1906, c. 463, Part II, §§ 196, 197. *Director General of Railroads v. Peoples Express Inc.* 199.

The provisions of St. 1906, c. 463, Part II, §§ 196, 197, do not require that a railroad corporation should give to all persons, engaged in a local express business upon its trains under the conditions specified in § 197, absolutely equal terms, facilities and accommodations regardless of conditions, but require only that as to each such person such terms, facilities and accommodations as the railroad shall make shall be reasonable and equal in view of all the attendant circumstances and conditions. *Ibid.*

Where a contract of an express company with a railroad contained a provision "That I will not ship or cause to be shipped any articles . . . unless accompanied by a messenger having an express ticket" and the express company repeatedly and deliberately violated this provision, and the Director General of Railroads while in charge of the operation of the railroad corporation, in May, 1919, notified the express company that all its privileges of doing business on the trains of the railroad were terminated and the express company refused to recognize the notice as binding, it was held that the Director General in a suit in equity was entitled to a decree enjoining the corporation from further use of the lines of the railroad in question. *Ibid.*

In the same suit the express company filed a cross bill seeking a mandatory injunction compelling the Director General to permit it to use the railroad in the course of its business, contending that the regulations in question were discriminatory and unfair to it, and this court, in dismissing the cross bill, did so without prejudice to the right of the express company, if any, to apply to the Department of Public Utilities for a revision of the regulation, if so advised. *Ibid.*

The provisions of Sts. 1861, c. 100; 1874, c. 372, § 107; Pub. Sts. c. 112, § 215; R. L. c. 111, § 271; St. 1906, c. 463, Part II, § 80, prevent the acquiring, by the owner of land adjoining a railroad location, of a title by adverse possession to the whole or to any part of the location or to an easement therein for support for structures on the adjoining owner's land. *Hurlbut Rogers Machinery Co. v. Boston & Maine Railroad*, 402.

Evidence in an action by a guest in a motor car, approaching a grade crossing of a railroad with a highway, to recover for his injuries sustained in jumping from the motor car to avoid a collision with an approaching train, against the Director General of Railroads, who was operating the railroad company, where the jury found specially that the signals required by St. 1906, c. 463, Part II, §§ 147, 148, were not given, which was held, warranted a finding that omission to give the signals was negligence of the defendant which con-

tributed to the injury to the plaintiff. *Fahy v. Director General of Railroads*, 510.

Evidence in the action above described upon which it was held that it could not be ruled as a matter of law, in an action against the operator of the railroad to recover for such injuries, either that negligence of the host should be imputed to the guest, or that the guest was guilty of contributory negligence. *Ibid*.

See also NEGLIGENCE, *Railroad*.

RECORD.

See that subtitle under EQUITY PLEADING AND PRACTICE.

REPLEVIN.

One, who in good faith and without notice of any fraud on the part of the mortgagor received a mortgage of goods, which was given to him upon his surrendering overdue and unpaid notes previously given to him by the mortgagor for sums lent from time to time before the giving of the mortgage, may maintain an action of tort for conversion of the goods against a sheriff whose deputy had seized and, after a demand by him, had retained the goods upon a writ of replevin brought against the mortgagor by one who had sold the goods to the mortgagor and had rescinded the sale by reason of the mortgagor's fraud. *Entin v. Evans*, 43.

RESTRICTION.

EQUITABLE RESTRICTIONS, see that title.

REVIEW, WRIT OF.

See WRIT OF REVIEW.

RIOT.

Allegations in a complaint, that the defendants "did unlawfully, riotously and tumultuously assemble with thirty or more persons, and while so unlawfully assembled as aforesaid, with a certain weapon dangerous to life, to wit, a knife, did . . . wound . . . a police officer of said city of Boston, lawfully engaged in dispersing and suppressing said unlawful assembly," fully and sufficiently charge the defendants with the common law offence of a riot. *Commonwealth v. Frishman*, 449.

The allegation of assault in the complaint above described is merely incidental to and a part of the charge of riot, but is not an essential part of that offence. *Ibid*.

Where, at the trial of a complaint charging the common law offence of a riot, there is evidence upon which it can be found that the defendants participated in a common purpose by force and violence to march and parade on a public street without permission and in violation of law, that during the

Riot (*continued*).

progress of the parade the paraders were ordered to disperse and that violence ensued, a finding is warranted that the defendants were guilty of a riot. *Commonwealth v. Frisbam*, 449.

In order that the defendants above described should be found guilty of the common law offence of a riot, it is not necessary that all of them should commit a physical act of violence; but it is sufficient to warrant conviction if the defendants are found to have been acting in concert with the others for the accomplishment of a common unlawful purpose and were aiding and abetting by their presence. *Ibid.*

Persons present at a riot and consenting to the unlawful acts and in a position where they may render aid and assistance may be found guilty as principals. *Ibid.*

Where, at the trial of the complaint above described, which alleged that a police officer was stabbed with a knife, there was evidence that the officer was stabbed but no direct evidence of the character of the weapon used, it was held, that a finding that he was stabbed with a knife was not warranted. *Ibid.*

Upon a complaint charging the common law offence of a riot and containing an allegation that the defendants "while unlawfully assembled" assaulted a police officer with a knife, it is not necessary under R. L. c. 218, §§ 21, 34, 35, to show that the officer was stabbed by one of the defendants or that he was stabbed at all. *Ibid.*

Upon a complaint charging an offence which is a riot at common law, the offence exists independently of statute, and it is not necessary to prove that the participants were ordered to disperse by the officials named in R. L. c. 211, § 1. *Ibid.*

ROBBERY.

Evidence given by a witness before the grand jury which was offered by the defendant at the trial of an indictment for robbery of jewels for the purpose of discrediting the witness and which it was held should have been admitted. *Commonwealth v. Homer*, 526.

Evidence at the trial of an indictment which charged that the defendant, a man, "did assault and beat" the complaining witness, a woman, "with intent to rob her and thereby did rob and steal from the person of said" witness certain described articles of jewelry which was held sufficient to support the indictment. *Ibid.*

In order to prove the crime of robbery, it is not necessary to prove that the defendant took the property from the person of the owner; it is enough if, when the property was in the owner's protection and control, he was compelled to surrender it by violence and fear caused by the defendant. *Ibid.*

As the indictment above described was tried, the question which the jury had to decide was, whether the jewels were taken from the owner by force and against her will, the defendant contending that they were delivered to him voluntarily by the owner as security for money which he had left with her and it was held that requests by the defendant at the close of the evidence, for instructions based on an assumption that the defendant procured possession of the jewels in an honest belief that he had a right to do so to satisfy a debt due him rightly were refused because there was no evidence to which they were applicable. *Ibid.*

RULE AGAINST PERPETUITIES.

See PERPETUITIES, RULE AGAINST.

RULES OF COURT.

Rule 45 (1915) of the Superior Court. *Commonwealth v. Hassan*, 26, 30.

SALE.

What constitutes.

If the directors of a business corporation, incorporated under the laws of the State of Maine, and having a usual place of business in this Commonwealth, which has outstanding both preferred and common stock, caused to be organized under the laws of the State of Maine another corporation, issuing common stock only, and all of the stockholders, both preferred and common, of the original corporation exchange their shares for shares of stock of the new corporation, after which the original corporation transfers all its property to the new corporation, which continues the business as before; and if an inhabitant of this Commonwealth, who owned shares of the preferred and of the common stock of the original corporation, exchanged them for shares of stock of the new corporation, which were of greater value, such transaction is a sale of the shares in the original, and a purchase of the shares in the new corporation and the gain resulting therefrom is subject to a tax under St. 1916, c. 269, § 5 (c): *Osgood v. Tax Commissioner*, 88.

Circumstances under which it was held that an exchange of shares of stock in one New York corporation, by an inhabitant of Massachusetts, share for share, for shares in another New York corporation, of a much larger capitalization, which was organized to acquire the common stock of four corporations engaged in the manufacturing of products which could be conducted more economically under a single management and issued substantially all of its capital stock for that purpose, was a sale and purchase of intangible personal property under St. 1916, c. 269, § 5 (c), and that the gain resulting therefrom was subject to the income tax imposed by that statute. Following *Osgood v. Tax Commissioner*, *ante*, 88. *Stone v. Tax Commissioner*, 93.

Warranty.

Where, by a former bill of sale and conveyance under seal, the owner of "All brick of every name, nature and description located" on certain property for the stated consideration of \$4,000 conveyed the bricks, thus described, to one who paid therefor \$1,000 in cash and \$3,000 by a promissory note, the instrument containing a covenant and warranty of title but no warranty or representation as to quality, it is not open to the purchaser, in an action against him by the seller upon the promissory note, to contend that there had been on the part of the seller a breach of warranty of quality, for which the purchaser sought damages in recoupment. *Bennett v. Thomson*, 463.

Tax Sale.

See TAX.

SHIP.

One employed on a ship as ship's cook and seaman, who receives personal injuries when boarding his ship in tidewater by reason of the breaking of a defective ratline, which properly was being used by him and which should have been kept in a safe condition by the owner of the ship, may recover damages for his injuries in an action of tort at common law against the owner of the vessel in the Superior Court. *Proctor v. Dillon*, 538.

If a member of a crew of a ship, which belongs to two owners and is managed by only one of them, receives personal injuries while in tidal waters by reason of a defective condition of a ratline which it was the duty of the owners to keep in a fit condition, he may recover full compensatory damages in an action against the managing owner only. *Ibid*.

SLANDER.

See LIBEL AND SLANDER.

SNOW AND ICE.

In an action for personal injuries caused by slipping on ice alleged to have accumulated, by reason of the defendant's negligence, upon land of the defendant adjacent to the approach to a post office which occupied under a lease a portion of a building of the defendant, it was held that an instruction given by the trial judge relative to liability of the lessee was not open to objection, and that no substantial error in the charge resulting in a mistrial was shown. *Chestnut v. Sawyer*, 46.

Personal injuries sustained by falling on ice on a sidewalk in front of vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

Evidence at the trial of an action by a woman for personal injuries resulting from a fall upon ice alleged to have been caused to accumulate upon a sidewalk by a broken spout on a house of the defendant, which it was held was material, for the purpose of laying a foundation for the admission of the photographs and to connect and make relevant the evidence as to the appearance and conditions of the sidewalk at that place and time and which was not incompetent as being self-serving or "manufactured." *Burke v. Kellough*, 405.

At the trial of the action above described, testimony from a deposition of the associate counsel for the plaintiff properly may be admitted, tending to show that, at the time when the photographs were taken, he noticed ice

where the snow was swept off, and made measurements, which he described in detail. *Burke v. Kellough*, 405.

STATUTE.

The provision of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9. *Wheelwright v. Tax Commissioner*, 584

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 739.

STOCKBROKER.

Evidence in an action against a stockbroker by a customer to recover money paid on account of the purchase of certain shares of stock upon which it was held that the contract between the parties did not require the defendant to carry the stock on margin, but required the plaintiff to take the stock when issued and to pay for it in full. *Bendsten v. Lovell*, 133.

A Massachusetts stockbroker has the legal title to securities acquired by him under a contract, made with a customer who is a resident of Massachusetts and to be performed here, by the provisions of which the stockbroker is to receive, buy, sell and carry securities on margin; and, the customer being without a right to immediate possession, the stockbroker, if he uses the securities for his own purposes, is not liable to the customer in an action of tort for conversion. *Crehan v. Megargel*, 279.

A Massachusetts stockbroker, who has acquired securities under an agreement with a Massachusetts customer, made and to be performed in Massachusetts, whereby the stockbroker is to receive and carry securities as margin for the customer's account, if he fails to carry the securities as margin and uses them for his own purposes, may be charged with their value in an action by the customer for money had and received. *Ibid.*

In an action against a stockbroker by a customer for breach of an agreement to receive, buy and sell, and carry securities on margin, the burden rests on the stockbroker to prove that he had in his possession or control at all times, available for delivery to the plaintiff, the securities which he purported to be carrying for him. *Ibid.*

STREET RAILWAY.

Neither the provisions of an ordinance concerning the licensing and operation of motor vehicles used for the transportation of passengers for hire nor the action of the licensing authorities in revoking the licenses granted thereunder in order that the service of the public by the trustees of a street railway company might not be discontinued contravened the principles of the common law or of the statute relating to monopolies. *Burgess v. Mayor & Aldermen of Brockton*, 95.

Actions founded on alleged negligence of street railway corporations or their employees, see appropriate subtitle under NEGLIGENCE.

STRIKE.

In a suit in equity brought by an employer against the officers and members of a labor union which had called a strike in the employer's shop, established picketing and caused letters to be sent to the employer's customers and employees urging a boycott of the employer, where it appeared that the picketing was conducted in a coercive manner with threats and scurrilous language for the purpose of rendering the employment of the employees uncomfortable or unbearable and of causing them to leave their employment, and that the purpose of the strike and boycotting letters was to compel the employer to accept the union agreement, it was held that the purpose of the strike was unlawful. *Folsom Engraving Co. v. McNeil*, 269.

In the same suit it was held that the officers and members of the union were not protected by St. 1913, c. 690, which was applicable only to a lawful strike lawfully conducted. *Ibid.*

In the same suit it also was held that the employer was entitled to injunctive relief. *Ibid.*

SUPERIOR COURT.

Although the rules of the Superior Court of 1915 by their terms are restricted in operation to civil business of the court, Rule 45, requiring that requests for instructions or for rulings shall be made in writing before the closing arguments unless later special leave is given to present further requests, should be adopted in trials of criminal cases by analogy when applicable. By Rugg, C. J. *Commonwealth v. Hassan*, 26.

The Superior Court has jurisdiction under St. 1913, c. 563, § 1, to proceed by indictment against one who gets a woman with child, not being her husband. *Commonwealth v. Mekelburg*, 383.

SURETY.

Evidence in an action by the owner of shares of the capital stock of a corporation against the purchaser and a surety company which had executed a bond to indemnify the seller "in the event of the failure" of the purchaser to pay a note given by the purchaser in payment of the shares upon which it was held that the existence of the note was a prerequisite to the liability of the surety. *Burdett v. Walsh*, 153.

TAX.

Exemption.

Exemptions from taxation must appear plainly either from the express words of a statute or by necessary intendment from its express words. *Wheelwright v. Tax Commissioner*, 584.

The provisions of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9. *Ibid.*

On Income.

If the directors of a business corporation, incorporated under the laws of the State of Maine and having a usual place of business in this Commonwealth, which has outstanding both preferred and common stock, cause to be organized under the laws of the State of Maine another corporation, issuing common stock only, and all of the stockholders, both preferred and common, of the original corporation exchange their shares for shares of stock of the new corporation, after which the original corporation transfers all its property to the new corporation, which continues the business as before; and if an inhabitant of this Commonwealth, who owned shares of the preferred and of the common stock of the original corporation, exchanged them for shares of stock of the new corporation, which were of greater value, such transaction is a sale of the shares in the original, and a purchase of the shares in the new corporation and the gain resulting therefrom is subject to a tax under St. 1916, c. 269, § 5 (c). *Osgood v. Tax Commissioner*, 88.

Circumstances under which it was held that an exchange of shares of stock in one New York corporation, by an inhabitant of Massachusetts, share for share, for shares in another New York corporation, of a much larger capitalization, which was organized to acquire the common stock of four corporations engaged in the manufacturing of products which could be conducted more economically under a single management and issued substantially all of its capital stock for that purpose, was a sale and purchase of intangible personal property under St. 1916, c. 269, § 5 (c), and that the gain resulting therefrom was subject to the income tax imposed by that statute. Following *Osgood v. Tax Commissioner*, ante, 88. *Stone v. Tax Commissioner*, 93.

On Income received by Executor.

The provisions of St. 1916, c. 269, § 8, that "The provisions of this act with reference to the taxation of income received by trustees shall, so far as apt, and except as otherwise provided herein, apply to the income received by executors and administrators," does not operate to extend to executors and administrators the exemptions later added for the benefit of trustees by St. 1918, c. 207, amending St. 1916, c. 269, § 9. *Wheelwright v. Tax Commissioner*, 584.

Tax (*continued*).

In the above statutes so construed there is nothing violative of the constitutional rights of executors and administrators. *Wheelwright v. Tax Commissioner*, 584.

Tax on Income of Foreign Corporation.

Upon a bill in equity by a corporation organized under the laws of Maine and having a usual place of business in Boston in this Commonwealth, the principal business of which was the buying of milk from farmers, transporting it to Boston and there selling it by daily deliveries to retail dealers and consumers, seeking the abatement of a tax upon its net income for the year ending January 31, 1918, assessed under St. 1918, c. 253, where it appeared that the corporation also manufactured and sold certain other milk and dairy products both within and outside of Massachusetts it was held that by the provisions of § 3 of the statute, income derived by the corporation from sales of milk and other articles either outside of Massachusetts or by direct shipment from outside of Massachusetts to its customers within the Commonwealth was not subject to taxation. *H. P. Hood & Sons v. Commonwealth*, 572.

Evidence in the suit above described upon which it was held that the corporation ceased to be engaged in interstate commerce as to the milk when, after its arrival in Boston, it changed the method of dealing with and disposing of it. *Ibid*.

Evidence in the suit above described upon which it was held that the transactions with the milk after its arrival in Boston were domestic transactions, and net income derived therefrom was subject to the tax imposed by the statute. *Ibid*.

In the above described suit it also was held that the statute did not impose a direct burden upon interstate commerce and violated no right secured to the corporation by the Federal Constitution. *Ibid*.

Validity of Tax Sale.

A description of land in a certain city in an assessment of it for taxes, in an advertisement of it for sale for unpaid taxes and in a deed of it to the purchaser at the sale is sufficiently definite and accurate if it is by reference to a lot by number on a certain plan recorded in the office of the assessors of taxes but not in the registry of deeds. *Larsen v. Dillenschneider*, 58.

TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

TRADE NAME.

Evidence in a suit by one Robert Burns to restrain a corporation named William J. Burns International Detective Agency, Inc., from using the name "Burns Detective Bureau," "Burns Detective Agency" or "Burns Agency," upon which it was held that William J. Burns had a right to use his own name in his business as a detective and to incorporate and carry on a detec-

tive agency with the use of the name. *Burns v. William J. Burns International Detective Agency, Inc.* 553.

Evidence in the above described suit of the form of listing the defendant's name in the telephone directory upon which it was held that the likelihood that the mere alphabetical arrangement in the telephone directory would mislead was not a sufficient reason for issuing an injunction, where it did not appear that the defendant attempted to hold itself out as the plaintiff, or to deceive the plaintiff's patrons. *Ibid.*

Evidence in the above described suit upon which it was held that the bill should be dismissed. *Ibid.*

TREE.

Under the provisions of St. 1915, c. 145, § 5, no one excepting a tree warden or his deputy may trim, cut or remove a tree within the limits of a highway of a town, even if the tree endangers persons lawfully travelling upon the highway; but, if such tree is a source of danger to travellers on the highway, it is the duty of the town officials to order the tree warden to trim or to cut down the tree and of the tree warden to carry out the order. *Valvoline Oil Co. v. Winthrop*, 515.

Failure of town officials to order the tree warden to cause the removal of a limb of a public shade tree which for a long time so had overhung the travelled portion of a highway as to be a source of danger and an obstruction to the travelling public, and to give such warning to travellers on the way as would protect them while the tree warden was carrying out the order, will render the town liable for damages resulting from a traveller in a wagon upon the highway running into the limb. *Ibid.*

Where, from the trunk of a sound and healthy tree about fifty years of age standing in a sidewalk within the limits of a public way and within six inches from the roadway, a limb, also sound and healthy and three feet six inches in circumference where it leaves the trunk, protrudes over the roadway seven feet above the surface of the ground, such limb may be found to be a defect in the way within the provisions of St. 1917, c. 344, Part IV, § 24. *Ibid.*

TRUST.

Declaration in Contemplation of Marriage.

Upon a bill in equity for instructions by the trustees under a declaration of trust executed in Massachusetts by a single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit. *Greenough v. Osgood*, 235.

Reformation of Instrument.

Misconception of the legal effect of the language used in a declaration of trust is not a "mistake of law" entitling the settlor to maintain a suit in equity to reform the instrument. *Coolidge v. Loring*, 220.

A declaration of trust which placed upon the trustees important contractual duties and responsibilities will not be reformed by reason of a mistake in which it is not shown that the trustees participated. *Ibid.*

Evidence upon which it was held that a suit in equity could not be maintained by the settlors under a declaration of trust to reform the instrument so that it would permit them to terminate the trust by a surrender of their life interests to the remaindermen, the settlors alleging that appropriate language for that purpose was omitted from the instrument through mistake. *Ibid.*

Construction of Instrument creating Trust.

Upon a bill in equity for instructions by the trustees under a declaration of trust executed in Massachusetts by a single woman, residing in the State of New York, in contemplation of her marriage to a man residing in California, placing in trust property which she had inherited from her mother, who had resided in Massachusetts, and which consisted of real estate in Massachusetts, notes secured by mortgages of real estate in Massachusetts and securities which, with all documents of title, were kept in Massachusetts in the hands of trustees who were Massachusetts residents, it was held that the donor intended that the trust should be administered by the laws of Massachusetts, and therefore that the Massachusetts court had jurisdiction of the suit. *Greenough v. Osgood*, 235.

Provisions in the trust above described upon which it was held in the same suit that there being a default of appointment of the interest in remainder following the life estate of the fourth child of the donor, that interest vested in the children of the donor and their heirs and assigns. *Ibid.*

Provisions in a will made by a woman, who in contemplation of marriage previously had executed a declaration of trust providing that, if she survived her husband, the trustee should hold the property for the use of her children in such manner as she by deed, instrument in writing or will "should direct or appoint" upon which in a bill in equity by the trustee under the declaration of trust for instructions it was held that the entire trust fund should be conveyed to the executor of the will of the donor for the use and benefit of the children of the donor "as their interests in the fund appear." *Ibid.*

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department to be called the "Pratt School of Naval Architecture and Marine Engineering" under which it was held in a suit in equity for the sale of real estate by the residuary devisee that the trust estate vested in the Institute with the receipt of the funds. *Massachusetts Institute of Technology v. Attorney General*, 288.

A direction or condition in the will above described that the building should be erected forthwith by the Institute after the receipt of the fund was held a requirement that it should be erected within a reasonable time, having regard to the circumstances. *Ibid.*

In the same suit it was held that the erection of a building, during the World War, such as the state of development of naval architecture and marine engineering demanded, would have required an expenditure of money entirely disproportionate to the fund, and would have left an income inadequate to maintain the building or the school. *Massachusetts Institute of Technology v. Attorney General*, 288.

Provisions in the will above described under which it was held that the legal title and the equitable title came into existence at once on the death of the testator, subject to the administration of the estate and the accumulation of principal and income to the net amount of \$750,000 within twenty-one years. *Ibid.*

Provisions in the same will under which it was held that the entire residue of the estate, that is, all the estate except so much as was needed to be set apart to insure the payment of the life interest and the annuities, formed a trust for charitable uses, subject to be divested if the principal and accumulated income did not amount to \$750,000 on or before the expiration of twenty-one years. *Ibid.*

The fund which was formed by the will above described was not limited upon a life estate, but was all the rest and residue of property owned by the testator, some of which was subject to the life interests of individuals. *Ibid.*

The provisions of the will above described constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust. *Ibid.*

Provisions in a will of a grandfather under which it was held that the widow of the deceased grandson was entitled as executrix of her husband's will to receive one third part of the income which had accrued between the date of the last payment of income to her husband and his death. *Old Colony Trust Co. v. Sargent*, 298.

In the same suit it was held that the widow was not entitled as executrix or otherwise to receive any part of the income from the trust fund accruing after her husband's death. *Ibid.*

In the same suit it also was held that the entire income accruing after the death of the grandson should be paid to his mother and sister equally, and, upon the death of either of them, to the survivor of them wholly. *Ibid.*

In the same suit it also was held that the widow of the grandson was entitled to one half the principal of the trust fund upon the death of her husband's mother and sister. *Ibid.*

The other residuary legatees under the will and codicil creating the trust above described were not entitled to receive any part of the principal of the fund. *Ibid.*

Administration.

A trustee, to whom has been devised and bequeathed real and personal property under a will of which he is also executor and who is exempt from giving surety on his bond as trustee and executor, where the will provides that he is not to transfer the trust property to the beneficiary until it, with accumulations, has attained a certain amount, may acquire, before the allowance of his final account as executor, title to the personal property by any notorious act of himself as executor showing his election to hold the property thereafter as trustee, and, if the combined real and personal prop-

erty then has attained the designated amount, he may convey the real estate to the beneficiary, who will thereby acquire a valid title. *Massachusetts Institute of Technology v. Attorney General*, 288.

Resulting.

Findings of a master, to whom was referred a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor, upon which it was held that it must be taken as a fact that the business was purchased by the plaintiff. *Glover v. Waltham Laundry Co.* 330.

In the above described suit it was held that the circumstances that a part of the purchase price was furnished by the man through the discharge of the debt owed to him by the former proprietor did not cut down the effect of the main finding that the title passed to the plaintiff. *Ibid.*

Findings of a master in a suit in equity by a woman against the executor of the will of her husband to have shares of stock in a corporation, issued to the husband and a nominee of his, impressed with a resulting trust in her favor upon which it was held, that the identity of the shares of stock, standing in the name of the plaintiff's husband and of his nominee, as representing what previously was her property, was established. *Ibid.*

In the above described suit it also was held that the circumstances that property of the husband in an outside venture, which proved valueless, was part of the consideration for the shares issued to him was of no consequence. *Ibid.*

Charitable.

Provisions in a will creating a trust of the residue and directing that the trust fund, upon certain contingencies, should be paid over by the trustees to the Massachusetts Institute of Technology to found and endow a department to be called the "Pratt School of Naval Architecture and Marine Engineering" under which it was held in a suit in equity for the sale of real estate by the residuary devisee that the entire residue of the estate, that is, all the estate except so much as was needed to be set apart to insure the payment of the life interest and the annuities, formed a trust for charitable uses, subject to be divested if the principal and accumulated income did not amount to \$750,000 on or before the expiration of twenty-one years. *Massachusetts Institute of Technology v. Attorney General*, 288.

In the same suit it was held that the fund which was formed was not limited upon a life estate, but was all the rest and residue of property owned by the testator, some of which was subject to the life interests of individuals. *Ibid.*

In the same suit it was also held that the provisions of the will constituted, not a gift to an individual to be followed by a remote gift to a charity, but an immediate gift of a legal interest to be held on a charitable trust. *Ibid.*

In the same suit it was held that a direction to erect a memorial of bronze in the interior of the building was a mere incident in the construction of the building; and the testator's motive to commemorate himself and family did not prevent the main purpose from being charitable. *Ibid.*

UNION.

See LABOR AND LABOR UNION.

UNLAWFUL INTERFERENCE.

In a suit in equity brought by an employer against the officers and members of a labor union which had called a strike in the employer's shop, established picketing and caused letters to be sent to the employer's customers and employees urging a boycott of the employer, where it appeared that the picketing was conducted in a coercive manner with threats and scurrilous language for the purpose of rendering the employment of the employees uncomfortable or unbearable and of causing them to leave their employment, and that the purpose of the strike and boycotting letters was to compel the employer to accept the union agreement, it was held that the purpose of the strike was unlawful. *Folsom Engraving Co. v. McNeil*, 269.

In the same suit it was held that the officers and members of the union were not protected by St. 1913, c. 690, which was applicable only to a lawful strike lawfully conducted. *Ibid.*

USAGE.

See CUSTOM.

VACATION.

Vacation of judgment, see appropriate subtitle under PRACTICE, CIVIL.

VERDICT.

See PRACTICE, CIVIL.

WAIVER.

Evidence at the trial of an action by the owner of shares of the capital stock of a corporation against a purchaser of the shares and a surety company, which had executed a bond to indemnify the seller "in the event of the failure" of the purchaser to pay a note given by the purchaser in payment for the shares, was offered by the plaintiff, to show a waiver by the surety company of its defence arising from the lack of a note, and was excluded subject to the plaintiff's exception, which he did not argue in this court and it was held that an exception to the exclusion of this evidence, not having been argued, was treated as waived; and it also was stated that the evidence properly was excluded because it did not tend to show a waiver by the company. *Burdett v. Walsh*, 153.

In an action against an insurance company by one of two persons upon a policy of insurance insuring them "as their interest may appear" against loss of an automobile by theft, and containing a condition that failure to

give notice of loss within a certain time shall render a claim of loss void, if neither person gives the required notice after the theft of the automobile, neither person has any enforceable right under the policy and a payment by the company to one of the insured persons of the amount of his loss is a mere gratuity and does not operate as a relinquishment by the company of the right to insist that a failure by the other person to give the required notice was a bar to an action by him upon the policy. *Navickis v. Fireman's Fund Ins. Co.* 256.

Where in an action by a building contractor upon a contract in writing for the construction of a building for the defendant was heard by a judge without a jury upon an auditor's report and evidence both oral and documentary and the judge found that a requirement of the contract, that final payment should be made only upon certificate of the architect, was waived by the parties and found for the plaintiff. *James Elgar, Inc. v. Newhall*, 373.

WATER SUPPLY.

In a suit in equity by the town of Oak Bluffs against the Cottage City Water Company, organized under St. 1890, c. 151, to enjoin the defendant from charging for water supplied to domestic consumers in the town a rate higher than that stated in the schedule annexed to an agreement between the town and the company, made in 1910, the plaintiff alleged and contended that the agreement provided that the rate stated in its schedules should be maintained by the defendant unchanged for twenty years, and, in determining the case, it was assumed, without so deciding, that the town had authority to enter into a proper contract with the company respecting water rates to be charged for domestic consumption. *Oak Bluffs v. Cottage City Water Co.* 18.

In the suit above described it was held that the rates to be charged to domestic consumers were not fixed by the contract for the entire term of twenty years, and that the company might raise its rates to domestic consumers in order to secure a fair return for services rendered, subject to the provisions of St. 1914, c. 787, which superseded St. 1909, c. 319. *Ibid.*

WAY.

Private.

Evidence in a suit to enjoin the maintenance of a barway as an obstruction to a right of way upon which it was held that the inference was warranted that both of the adjoining owners understood and mutually agreed that the way should be located at the place shown by the gate and the barway. *Dunham v. Dodge*, 367.

Where a right of way from a farm across an adjoining farm to and from a public way was given by deed without limitation or reservation and the width of the way was not defined, the easement was to the use of a way of reasonable width; and, in determining what is reasonable width, the character and configuration of the land, the purposes for which the land and the way were used at the time of the grant, and all the circumstances attending the grant are to be considered. *Dunham v. Dodge*, 367.

Evidence in the above described suit upon which it was held that a barway ten and eighteen one hundredths feet in width, erected by the owner of the westerly farm to give access to and from the way, properly may be found not to be of sufficient width. *Dunham v. Dodge*, 367.

Public.

Laying out.

If, upon the filing by a landowner of plans relative to the laying out of streets over certain land with a board of survey under the provisions of St. 1907, c. 191, the board is not satisfied with the plans, their powers and duties then are, not to reject the plans, but to alter them, determine where the streets should be located and what their widths and grades should be and, having so indicated on the plans, to approve and sign the plans as changed. *Lexington Board of Survey v. Suburban Land Co.* 108.

Signs.

A board of survey constituted under the provisions of St. 1907, c. 191, by a town has no right or power conferred by the common law or by statute to erect or maintain a sign within the highway, the fee to which is owned by a private person who has not granted such a right to the town, containing a warning to purchaser as to the character of roads which would be acceptable to the board. *Lexington Board of Survey v. Suburban Land Co.* 108.

Defect.

Personal injuries sustained by falling on ice on a sidewalk in front of the vacant land will not render the person in control of the real estate liable therefor in damages where it does not appear that the ice resulted from an artificial collection of water by spout or otherwise, although the person in control of the premises violated a municipal ordinance in failing to remove the ice or to render walking over it safe by scattering ashes, sand or other material. *Hart v. Wright*, 243.

Under the provisions of St. 1915, c. 145, § 5, no one excepting a tree warden or his deputy may trim, cut or remove a tree within the limits of a highway of a town, even if the tree endangers persons lawfully travelling upon the highway; but, if such a tree is a source of danger to travellers on the highway, it is the duty of the town officials to order the tree warden to trim or to cut down the tree and of the tree warden to carry out the order. *Valvoline Oil Co. v. Winthrop*, 515.

Failure of town officials to order the tree warden to cause the removal of a limb of a public shade tree which for a long time so had overhung the travelled portion of a highway as to be a source of danger and an obstruction to the travelling public, and to give such warning to travellers on the way as would protect them while the tree warden was carrying out the order, will render the town liable for damages resulting from a traveller in a wagon upon the highway running into the limb. *Ibid.*

Where, from the trunk of a sound and healthy tree about fifty years of age standing in a sidewalk within the limits of a public way and within six inches from the roadway, a limb, also sound and healthy and three feet six inches in circumference where it leaves the trunk, protrudes over the roadway seven feet above the surface of the ground, such limb may be found to be a

Way (*continued*).

defect in the way within the provisions of St. 1917, c. 344, Part IV, § 24. *Valooline Oil Co. v. Winthrop*, 515.

Want of railing.

Evidence in an action against a town under St. 1917, c. 344, Part IV, § 24, for personal injuries alleged to have been sustained while driving in a motor car by reason of a want of a sufficient railing upon a way approaching a bridge over a river, which warranted a finding that a want of a sufficient railing upon the highway caused the injury to the plaintiff. *Bond v. Billerica*, 119.

Although a municipality is not required to erect, between a highway and an embankment bordering a river, a railing of sufficient strength to protect a motor vehicle of great weight, as compared to a horse-drawn vehicle, from going over the embankment, it seems that a railing might be found to be sufficient to insure the safety of ordinary travel and therefore sufficient to prevent the municipality from being liable under St. 1917, c. 344, Part IV, § 24, for injury or damage caused by want of a sufficient railing, if it was of a character to prevent a motor car of the type known in November, 1918, as a "Ford touring car" from running over the embankment where, when going at the rate of from twelve to fifteen miles an hour, the car had swerved and, with its clutch thrown out and its brakes set, had crossed the road to the embankment. *Ibid*.

Trespasser.

Under the provisions of St. 1909, c. 534, § 2, as amended by St. 1912, c. 400, § 1, registration of a motor vehicle in the name of a part owner thereof, who does not operate it, is insufficient to make lawful operation of such vehicle upon a public way by a co-owner in whose name it is not registered and whose name, place of residence and address are not stated in the application for registration. *Shufelt v. McCartin*, 122.

Parade.

A parade on the public street of the city of Boston without a permit required by the board of street commissioners is unlawful. *Commonwealth v. Friskman*, 449.

Negligent use of.

See NEGLIGENCE, *In use of highway*.

WILL.

Construction of wills, see DEVISE AND LEGACY.

WITNESS.

Impeachment.

Where a judge, who at a trial, subject to an exception by the plaintiff, erroneously had permitted the defendant, in order to impeach testimony of his own witness to introduce certain evidence, charged the jury in substance that, if they believed the evidence offered in impeachment, then they "just put the testimony of the first witness out of the case. You do not put in the

second witness's testimony as affirmative facts or having any probative force" it was held that the rights of the plaintiff were protected, and that his exception must be overruled. *Bloustein v. Shindler*, 440.

Cross-examination.

In an action of tort for personal injuries alleged to have been caused by the negligence of the defendant in removing an iron fence it was held that cross-examination of the defendant's foreman, who was called as a witness for the defendant, to elicit the reasons why a former employee of the defendant, who had testified for the plaintiff, had been discharged, was wholly within the discretion of the trial judge. *Del Visco v. General Electric Co.* 415.

Where without producing any record of bankruptcy a district attorney at the trial of an indictment for robbery was allowed to cross-examine the defendant as to whether he had filed a petition in bankruptcy several years before the robbery, it was stated that such a method of cross-examination was highly prejudicial to the defendant, and that, irrespective of whether the district attorney believed that a petition in bankruptcy had been filed, an unfair advantage was taken of the defendant in putting the questions. *Commonwealth v. Homer*, 528.

Where at the trial above described the district attorney was permitted to ask a witness in cross-examination a series of questions as to whether, on sundry occasions, knowledge had come to her that "the authorities" were making an inquiry as to the defendant "selling dope" and all answers were in the negative, without determining whether the exceptions to the evidence should be sustained, this court stated that the method of cross-examination was highly improper and prejudicial to the defendant, being an attempt by unfair means to belittle him and render him unworthy of respect or credit. *Ibid.*

Before Grand Jury.

Statement by RUGG, C. J., of some instances where the presence before a grand jury, while a witness is testifying, of persons other than the witness is lawful because it is necessary in order that the grand jury may ascertain the truth as to the matter under investigation. *Lebowitch, petitioner*, 357.

Evidence given by a witness before the grand jury which was offered by the defendant at the trial of an indictment for robbery of jewels for the purpose of discrediting the witness and which it was held should have been admitted. *Commonwealth v. Homer*, 528.

Expert.

It is within the discretionary power of a trial judge to exclude a hypothetical question asked of an expert witness if in the question facts are assumed which are not yet in evidence. *Earle v. New York Central & Hudson River Railroad*, 61.

A hypothetical question asked by the defendant in cross-examination of an expert medical witness called by the plaintiff at the trial of an action of tort based upon an assumption of facts of which no evidence yet had been

Witness (continued).

introduced was held properly excluded. *Earle v. New York Central & Hudson River Railroad*, 61.

Married Person.

At the trial of an indictment charging a man with perjury, it is proper to admit in evidence testimony of his wife, voluntarily given, as to statements which were made by him to her previous to their marriage and which tend to establish his guilt. *Commonwealth v. Barronian*, 364.

WORDS.

"Accident." See *Tremont Trust Co. v. Burack*, 398, 402.

"Artifice." See *Davis v. Boston Elevated Railway*, 482, 500.

"Compensation." See *Proctor v. Dillon*, 538, 546.

"Damages." See *Proctor v. Dillon*, 538, 546.

"Final order." See *Sallinger v. Hughes*, 104.

"Inadvertence." See *Tremont Trust Co. v. Burack*, 398, 402.

"Indemnity." See *Proctor v. Dillon*, 538, 546.

"Material." See *Davis v. Boston Elevated Railway*, 482, 495.

"May." See *Commonwealth v. Mekelburg*, 383, 384.

"Memorandum of decision." See *Davis v. Boston Elevated Railway*, 482, 494, 495.

"Owner." See *Shufelt v. McCartin*, 122, 125.

"Payable." See *Beaman v. Gerrish*, 79, 84.

"Person who is aggrieved." See *Monroe v. Cooper*, 33, 34.

"Purchases." See *Osgood v. Tax Commissioner*, 88, 90, 91, 92.

"Sales." See *Osgood v. Tax Commissioner*, 88, 90, 91.

"Sometimes." See *Bernstein v. W. B. Manuf. Co.* 425, 428.

"Such action." See *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114, 115.

"Trial." See *Marsch v. Southern New England Railroad*, 304, 307.

WORKMEN'S COMPENSATION ACT.

Procedure.

Finality of finding by Industrial Accident Board.

In a proceeding under the workmen's compensation act where the Industrial Accident Board's entire decision was, "revising the findings and decision of" a single board member, that they did "find and decide" that the employee's injury did not arise out of and in the course of his employment and on appeal to the Superior Court a decree was entered "upon all the evidence that" the employee's injury did not so arise, this court, on appeal, held that if the action of the Industrial Accident Board be regarded as a finding of fact it was final, being supported by the evidence; and that if it be treated as a ruling of law it was right. *Bolden's Case*, 309.

Review.

Where, in proceedings under the workmen's compensation act, there has been a hearing by a committee of arbitration under St. 1911, c. 751, Part III

§ 7, as amended by St. 1912, c. 571, § 12, and the committee has made an award of compensation by weekly payments and no claim for a review of their findings has been filed, upon a claim under St. 1911, c. 571, Part III, § 12, as amended by St. 1914, c. 708, § 11, for a review of the weekly payment, the questions, whether the employee received his injury in the course of his employment, and whether, when injured, he was an employee of the person insured, are not open. *Hurley's Case*, 387.

Appeal.

Upon an appeal from a decree of the Superior Court sustaining findings of the Industrial Accident Board affirming on review the findings of a board member that compensation as for total incapacity previously awarded by the board to a water boy and tool carrier employed in a granite quarry whose left hand had been crushed should cease, it was held that no error of law was apparent on the record. *Barry's Case*, 408.

Injuries to which Act applies.

Evidence in a proceeding under the workmen's compensation act, upon which it was held that an injury received by an employee in using a bubble fountain furnished by an employer did not arise out of and in the course of his employment. *Bolden's Case*, 309.

Incapacity of a cigar maker, caused by neuralgic pain which, in a proceeding under the workmen's compensation act, an impartial physician testified was likely to be caused by any other occupation and could result independently of any occupation or from any sitting or standing occupation, and which, upon evidence including that of the impartial physician, the Industrial Accident Board found was induced by muscular action in rolling cigars, while it properly may be found to have arisen during the course of the employee's employment, cannot be found to have arisen from it in such a sense as to entitle him to compensation under the workmen's compensation act. *Pimental's Case*, 598.

An occupational disease is not a personal injury, arising out of and in the course of employment, compensation for which may be awarded under St. 1911, c. 751, Part II, § 1. *Ibid.*

Dependency.

A husband and wife are not living together within the meaning of the workmen's compensation act so that the wife may be conclusively presumed to be wholly dependent upon her husband, where it appears that after the marriage and until his death the husband continued to live with his mother and the wife with her mother, although, from the time of the marriage, the husband contributed to his wife's support and visited her in her home twice a week, usually staying over night, when they occupied the same room. *Breakley's Case*, 460.

Amount of Compensation.

Upon an appeal from a decree of the Superior Court sustaining findings of the Industrial Accident Board affirming on review the findings of a board member that compensation as for total incapacity previously awarded by the board to a water boy and tool carrier employed in a granite quarry whose left hand had been crushed should cease, it was held that no error of law was apparent on the record. *Barry's Case*, 408.

WRIT OF ERROR

A refusal by a judge of the Superior Court to stay execution of a sentence imposed upon a defendant who had been found guilty after the trial of an indictment for crime is not subject to review either upon a petition for a writ of habeas corpus or upon a writ of error. *Lebowitch, petitioner*, 357.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Ibid.*

WRIT OF HABEAS CORPUS.

A refusal by a judge of the Superior Court to stay execution of a sentence imposed upon a defendant who had been found guilty after the trial of an indictment for crime is not subject to review either upon a petition for a writ of habeas corpus or upon a writ of error. *Lebowitch, petitioner*, 357.

If an indictment is returned by a grand jury upon evidence received by them from witnesses who testified in the presence of persons whose presence at the hearing was not necessary for the grand jury to ascertain the truth relating to matters under investigation, and if the defendant objects to the indictment on those grounds before he pleads generally, the indictment must be quashed; but such an objection, raised by a petition for a writ of habeas corpus and by a writ of error after a general plea of "not guilty," a trial, a verdict of guilty and a sentence, comes too late. *Ibid.*

WRIT OF REVIEW.

A ruling upon a matter of law by a judge of the Municipal Court of the City of Boston in a writ of review in the Municipal Court of the City of Boston is not subject to report to the Appellate Division. *Lynn Gas & Electric Co. v. Creditors National Clearing House*, 114.

A writ of review is a new proceeding and not merely a new hearing upon an existing proceeding. *Ibid.*

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